72093-7

FILED
Feb 11, 2016
Court of Appeals
Division I
State of Washington

NO. 72093-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LOVETT JAMES CHAMBERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGES THERESA DOYLE,
MICHAEL HAYDEN AND JAMES ROGERS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

A. CROSS ASSIGNMENT OF ERROR....1

B. ISSUES PRESENTED....1

C. STATEMENT OF THE CASE....2

1. PROCEDURAL FACTS....2

2. SUBSTANTIVE FACTS....2

D. ARGUMENT....17

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE LESSER OFFENSE OF FIRST-DEGREE MANSLAUGHTER....17

2. THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE STATEMENTS HE MADE TO THE POLICE....27

a. Relevant Facts....27

b. The Trial Court's Well-Reasoned Decision....31

3. THE POLICE LAWFULLY CONDUCTED A LIMITED PROTECTIVE SWEEP OF THE FRONT ROOM AND ATTACHED KITCHEN AFTER ARRESTING THE DEFENDANT AT HIS FRONT DOOR....40

a. Relevant Facts....41

b. Standard Of Review....44

c. The Protective Sweep Was Lawful....45

4. THE DEFENDANT HAS FAILED TO SHOW THAT HE WAS DEPRIVED OF HIS RIGHT TO COUNSEL DURING THE DEPOSITION OF BRIAN KNIGHT.....56

a. Relevant Facts.....57

b. The Defendant's Rights Were Not Violated.....63

5. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.....72

E. CONCLUSION.....81

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Aguilar v. Texas, 378 U.S. 108,
84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) 53

Chapman v. California, 386 U.S. 18,
87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 40

Edwards v. Arizona, 451 U.S. 477,
101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) 34

Harris v. United States, 390 U.S. 234,
88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968) 53

Hill v. Kemp, 833 F.2d 927
(11th Cir. 1987) 39

Illinois v. Allen, 397 U.S. 337,
90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) 68

In re Sealed Case 96-3167, 153 F.3d 759
(D.C. Cir. 1998) 51

Maryland v. Buie, 494 U.S. 325,
110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990) 45-51

Michigan v. Mosley, 423 U.S. 96,
96 S. Ct. 321, 46 L. Ed. 2d 313 (1975) 32, 33, 34, 37, 38

Miranda v. Arizona, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 32, 33

Rhode Island v. Innis, 446 U.S. 291,
100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980 33

Spinelli v. United States, 393 U.S. 410,
89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) 53

United States v. Henry, 48 F.3d 1282
(D.C. Cir. 1995) 48

United States v. Hoyos, 892 F.2d 1387
(9th Cir. 1989), cert. denied,
498 U.S. 825 (1990) 48

United States v. Hsu, 852 F.2d 407
(9th Cir. 1988) 38

United States v. Jackson, 700 F.2d 181
(5th Cir.), cert. denied,
464 U.S. 842 (1983) 48, 49

United States v. Knights, 534 U.S. 112,
122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) 49

United States v. Lauter, 57 F.3d 212
(2d Cir. 1995) 51

United States v. Oguns, 921 F.2d 442
(2d Cir. 1990) 48

United States v. Robinson, 775 F. Supp. 231
(N.D. Ill. 1991) 51

United States v. Ruiz, 257 F.3d 1030
(9th Cir. 2001) 48

United States v. Wade, 388 U.S. 218,
87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) 68

Washington State:

City of Seattle v. Patu, 147 Wn.2d 717,
58 P.3d 273 (2002) 70

In re Cross, 180 Wn.2d 664,
327 P.3d 660 (2014) 28

Sofie v. Fibreboard Corp., 112 Wn.2d 636,
771 P.2d 711 (1989) 67

State v. Aumick, 126 Wn.2d 422,
894 P.2d 1325 (1995) 55

State v. Benn, 161 Wn.2d 256,
165 P.3d 1232 (2007) 67

State v. Berlin, 133 Wn.2d 541,
947 P.2d 700 (1997) 18, 19

State v. Boggs, 16 Wn. App. 682,
559 P.2d 11, rev. denied,
88 Wn.2d 1017 (1977) 39

State v. Boyer, 124 Wn. App. 593,
102 P.3d 833 (2004), rev. denied,
155 Wn.2d 1004 (2005) 45

State v. Brown, 158 Wn. App. 49,
240 P.3d 1175 (2010), rev. denied,
171 Wn.2d 1006 (2011) 37, 39

State v. Clapp, 67 Wn. App. 263,
834 P.2d 1101 (1992), rev. denied,
121 Wn.2d 1020 (1993) 73

State v. Cole, 128 Wn.2d 252,
906 P.2d 925 (1995) 53, 54

State v. Collins, 30 Wn. App. 1,
632 P.2d 68, rev. denied,
96 Wn.2d 1020 (1981) 24

State v. Cornethan, 38 Wn. App. 231,
684 P.2d 1355, rev. denied,
103 Wn.2d 1007 (1984) 34

State v. Eisfeldt, 163 Wn.2d 628,
185 P.3d 580 (2008) 52

State v. Everybodytalksabcut, 161 Wn.2d 702,
166 P.3d 693 (2007) 67

State v. Fernandez-Medina, 141 Wn.2d 448,
6 P.3d 1150 (2000) 19

State v. Finch, 137 Wn.2d 792,
975 P.2d 967 (1999) 67, 69

State v. Foley, 174 Wash. 575,
25 P.2d 565 (1933) 18, 19

State v. Gaddy, 152 Wn.2d 64,
93 P.3d 872 (2004) 54

State v. Gonzales-Morales, 138 Wn.2d 374,
979 P.2d 826 (1999) 71

State v. Griffith, 164 Wn.2d 960,
195 P.3d 506 (2008) 69

State v. Guloy, 104 Wn.2d 412,
705 P.2d 1182 (1985) 40, 56

State v. Henderson, 114 Wn.2d 867,
792 P.2d 514 (1990) 70

State v. Hill, 123 Wn.2d 641,
870 P.2d 313 (1994) 44

State v. Hopkins, 113 Wn. App. 954,
55 P.3d 691 (2002) 46

State v. Hopson, 113 Wn.2d 273,
778 P.2d 1014 (1989) 67

State v. Hutchinson, 135 Wn.2d 863,
959 P.2d 1061 (1998) 65

State v. Jones, 95 Wn.2d 616,
628 P.2d 474 (1981) 24, 25, 26

State v. Maddox, 152 Wn.2d 499,
98 P.3d 1199 (2004) 53

State v. McKenzie, 157 Wn.2d 44,
134 P.3d 221 (2006) 80

State v. Mendez, 137 Wn.2d 208,
970 P.2d 722 (1999) 44

State v. Ng, 110 Wn.2d 32,
750 P.2d 632 (1988) 39

State v. Padilla, 69 Wn. App. 295,
846 P.2d 564 (1993) 70

State v. Pierce, 94 Wn.2d 345,
618 P.2d 62 (1980) 34

State v. Reed, 102 Wn.2d 140,
685 P.2d 699 (1984) 72

State v. Reuben, 62 Wn. App. 620,
814 P.2d 1177, rev. denied,
118 Wn.2d 1006 (1991) 36, 37, 38

State v. Ross, 141 Wn.2d 304,
4 P.3d 130 (2000) 52

State v. Rupe, 101 Wn.2d 664,
683 P.2d 571 (1984) 39

State v. Russell, 125 Wn.2d 24,
882 P.2d 747 (1994) 72, 73

State v. Sadler, 147 Wn. App. 97,
193 P.3d 1108 (2008), rev. denied,
176 Wn.2d 58 (2013) 50, 51

State v. Sargent, 40 Wn. App. 340,
698 P.2d 598, rev. denied,
111 Wn.2d 641 (1985) 72

State v. Stover, 67 Wn. App. 228,
834 P.2d 671 (1992), rev. denied,
120 Wn.2d 1025 (1993) 73

State v. Thein, 138 Wn.2d 133,
977 P.2d 582 (1999) 53

State v. Ulestad, 127 Wn. App. 209,
111 P.3d 276 (2005), rev. denied,
156 Wn.2d 1003 (2006) 71

State v. Vannoy, 25 Wn. App. 464,
610 P.2d 380 (1980) 39

State v. Walker, 185 Wn. App. 790,
344 P.3d 227, rev. denied,
183 Wn.2d 1025 (2015) 63, 64, 65, 67

State v. Walton, 64 Wn. App. 410,
824 P.2d 533, rev. denied,
119 Wn.2d 1011 (1992) 28

State v. Warren, 165 Wn.2d 17,
195 P.3d 940 (2008) 80

State v. Wheeler, 108 Wn.2d 230,
737 P.2d 1005 (1987) 32

State v. Whelchel, 115 Wn.2d 708,
801 P.2d 948 (1990) 55

State v. Williams, 18 Wash. 47,
50 P. 580 (1897) 63, 64

State v. Williams, 159 Wn. App. 298,
244 P.3d 1018, rev. denied,
171 Wn.2d 1025 (2011) 70

State v. Workman, 90 Wn.2d 443,
584 P.2d 382 (1978) 17

Tacoma News, Inc. v. Cayce, 172 Wn.2d 58,
256 P.3d 1179 (2011) 64

Other Jurisdictions:

Murphy v. State, 192 Md. App. 504,
995 A.2d 783 (2010) 49

People v. Fierro, 1 Cal.4th 173,
821 P.2d 1302 (1991), cert. denied,
506 U.S. 907 (1992) 65

People v. Maier, 226 Cal.App.3d 1670, cert. denied,
502 U.S. 848 (1991) 49

State v. Manuel, 229 Ariz. 1,
270 P.3d 828 (2011) 48

Constitutional Provisions

Federal:

U.S. CONST. amend. IV 45, 55

U.S. CONST. amend VI 63

Washington State:

CONST. art. I, § 22 ..... 63, 64

Statutes

Washington State:

RCW 9.94A.533 2

RCW 9A.08.010 18

RCW 9A.16.090 25

RCW 9A.32.050 ..... 2, 18

RCW 9A.32.060 18

RCW 9A.44.150 71

RCW 10.61.006 17

Rules and Regulations

Washington State:

CR 30 64

CR 32 64

CrR 3.6 ..... 40, 44

CrR 4.6 64

ER 804 67

Other Authorities

Merriam-Webster's Collegiate Dictionary at 639 (11th ed. 2003) 23

WPIC 1.02 76

A. CROSS ASSIGNMENT OF ERROR

The trial court erred when, in ruling on the defendant's motion to suppress the deposition of witness Brian Knight, the court felt that where there was an absence of evidence, the court was required to presume that the defendant did not have the ability to write. No facts support the presumption.

B. ISSUES PRESENTED

1. The defendant was charged with second-degree murder and convicted of first-degree manslaughter. Was there a factual basis for the trial court to give a lesser included jury instruction for first-degree manslaughter?

2. Was the trial court correct in finding that the defendant knowingly, intelligently and voluntarily waived his right to remain silent when he agreed to be questioned by the police?

3. Was the trial court correct that in arresting the defendant as he stepped out his front door, the police could conduct a limited "protective sweep"?

4. Was the trial court correct when it found that the defendant's constitutional rights were not violated by his being in restraints during the taking of a deposition from witness Brian Knight?

5. Has the defendant shown that the prosecutor committed misconduct in rebuttal closing argument?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with second-degree murder under the alternative means of felony murder and intentional murder. CP 2302; RCW 9A.32.050(1)(a) and (b). The charge carried with it a firearm sentence enhancement. CP 2302; RCW 9.94A.533(3). A jury returned a verdict of guilty to the lesser offense of first-degree manslaughter. CP 1774. The jury also found he committed the firearm sentence enhancement. CP 1775. The defendant received a 78 month standard range sentence plus the 60 month firearm enhancement. CP 2256-63.

2. SUBSTANTIVE FACTS

The defendant was a regular at the Feedback Lounge, a West Seattle liquor bar near his home. 24RP[1] 29-30; 25RP 42. He would come

[1] The verbatim report of proceedings is cited as follows: 1RP–1/7/14 (9 pages); 2RP–1/7/14 (139 pages); 3RP–1/8/14; 4RP–1/9/14; 5RP–1/13/14; 6RP–1/14/14; 7RP–1/15/14; 8RP–1/16/14; 9RP–1/21/14; 10RP–1/22/14; 11RP–1/23/14; 12RP–1/27/14; 13RP–1/28/14; 14RP–1/29/14; 15RP–1/30/14; 16RP–1/31/14; 17RP–2/3/14; 18RP–2/10/14; 19RP–2/11/14; 20RP–2/12/14; 21RP–2/13/14; 22RP–2/18/14; 23RP–2/19/14; 24RP–2/20/14; 25RP–2/24/14; 26RP–2/25/14; 27RP–2/26/14; 28RP–2/27/14; 29RP–3/3/14; 30RP–3/4/14; 31RP–3/5/14; 32RP–3/6/14; 33RP–3/10/14; 34RP–3/11/14; 35RP–3/12/14; 36RP–3/13/14; 37RP–3/19/14; 38RP–3/20/14; 39RP–3/24/14; 40RP–3/25/14; 41RP–3/26/14; 42RP–3/31/14; 43RP–4/1/14; 44RP–4/2/14 (a.m.); 45RP–4/2/14 (p.m.); 46RP–4/3/14; 47RP–4/4/14; 48RP–4/8/15; 49RP–6/13/14.

in almost every day at around 5:00 p.m. 24RP 29-30; 25RP 42. His drink of choice, vodka martinis. 24RP 30.

The defendant was also a very particular man, he had to have his martini served in a specific type of glass, the bar's lighting had to be just to his liking, and the music volume just right. 24RP 30-32. He would sit in the same seat at the bar every day and generally keep to himself, unless some of his friends, other regulars, were there. 24RP 31-33, 67, 69, 85.

The Feedback Lounge is located on the corner of California Avenue and Fauntleroy in West Seattle. Just to the north of the Feedback Lounge and across an alleyway is the Beveridge Place Pub, a wine and beer establishment. 24RP 57. Up the street to the north of both bars is Morgan Junction Park. The park is 195 feet from the front door of the Feedback Lounge. Trial exhibit 3.

On the evening of January 21, 2012, the defendant was at the Feedback Lounge drinking vodka martinis. 24RP 23, 53. When he arrived at the Feedback Lounge that night, he parallel parked his BMW directly in front of the Beveridge Place Pub. 25RP 55.

The defendant started drinking at the Feedback Lounge around 5:00 p.m.; and it was obvious to the bar staff that he had had a few too many. 24RP 80, 83. At one point during the evening, he became irritated because a bartender had served him a martini in what he perceived was the

wrong glass. 24RP 30-31, 82. He left the bar sometime after 9:00 p.m. 24RP 92.

That same evening, two "southern boys" and recent transplants to Washington, Jonathan Vause and Michael Travis Hood, went to the Feedback Lounge for the very first time. 27RP 17-18, 54. When Vause and Hood arrived that night, Vause parallel parked his red pickup truck up the block in front of Morgan Junction Park between a large van and a backhoe. 27RP 54-55. Vause and Hood arrived at the Feedback Lounge between 8:30 and 9:00 p.m. 27RP 49. Vause and Hood were celebrating the fact that Hood had received his first paycheck and had opened a bank account for the first time in his life. 27RP 48-49. However, Vause testified that when he and Hood entered the bar, they felt like they did not belong and that everyone was eyeing them. 27RP 57-58. They stayed for only about 45 minutes. 27RP 82-83. They sat in the back room, had a few beers and some food, played Pac-Man and then left. 25RP 16-17; 27RP 71. Their server testified that they seemed like two pretty normal and polite guys. 25RP 18-20. None of the employees noticed anything out of the ordinary inside the bar that night. 24RP 40, 42, 55.

When Vause and Hood exited the Feedback Lounge, Vause noticed the defendant standing by the door. 27RP 87. No words were

exchanged between the three men. 27RP 89-90. In fact, Vause thought that the defendant might be an employee of the Lounge. 27RP 90.

Vause and Hood proceeded north towards Vause's truck. 27RP 90. When they passed the alleyway between the Feedback Lounge and the Beveridge Place Pub, Vause looked over his shoulder and noticed that Hood had gone down the alleyway. 27RP 93, 96. Vause, who thought maybe Hood was going to the bathroom, called back over his shoulder, "what the hell you doin,' nigga." 27RP 96.

Vause explained that he and Hood grew up in poor black neighborhoods in the South and that where they came from, people referred to each other as "dawg," or "homey," or "nigga." 27RP 73-74, 78. In contrast, he said that "nigger" is a racist term that's "not a cool word," but that "nigga" is used regardless of race just like "homeboy" or "dude." 27RP 74.

When Vause got to his truck he climbed in the driver's seat. 27RP 97-98. Because of the large van parked in front of him, he could not see very far down the sidewalk and he could not see either Hood or the defendant. 27RP 98-99. Hood then came into view, followed by the defendant, who was about six to eight feet behind Hood. 27RP 102-03. Just as Hood got to the passenger door of the truck, he turned about 90 degrees and said something over his left shoulder. 27RP 103-04. Vause

could not hear what Hood had said. 27RP 104. Hood then opened the passenger door of the truck. 27RP 106. However, instead of getting into the truck, Hood grabbed a flathead shovel from the bed of the pickup truck. 27RP 107; trial exhibit 36.

When Hood grabbed the shovel, the defendant backed up until he was about ten feet away from Hood. 27RP 110. The shovel measures four feet ten inches. 35RP 21. Hood, with his right shoulder pointed towards the defendant, held the shovel in a batter's stance and said something to the effect of "what're you trying to do now." 27RP 108; 34RP 191. The defendant then pulled out a gun. 27RP 111. Hood yelled to Vause, "nigga, watch out, he's got a gun." 27RP 111. Hood neither advanced upon the defendant nor swung the shovel at him. 27RP 111. Instead, he turned to get in the truck but before he could make it, the defendant fired at least three shots at Hood. 27RP 111-12.

One bullet struck Hood in the chest but at such an extreme angle that the bullet did not enter his chest cavity. 34RP 158, 178. Instead, the bullet went just underneath his skin, exited his side and entered his left arm. 34RP 158-59, 165-66, 199. This wound is consistent with Vause's testimony that Hood was in a batter's stance with his shoulder facing the defendant. 27RP 108. In addition, according to the medical examiner, the exit wound on the side of the chest and the entry wound into Hood's left

arm suggested that his arm had been lowered out of a batter's stance and was now close to his torso. 34RP 165-66. The other two shots were directly into Hood's back at a 90 degree angle and went all the way through his body, exiting out his chest. 34RP 178. The medical examiner opined that Hood would have died very quickly. 34RP 179.

As Hood was shot, he fell face first across the seat of the truck. 27RP 114. Vause pulled Hood's legs into the truck, pushed the shovel handle out the door, made a U-turn and drove to what he thought was a hospital.[2] 27RP 115. Asked at trial if he knew what had happened between Hood and the defendant, if anything, before they arrived at the truck, Vause testified that he didn't know. 27RP 129.

With the defendant being a regular at the Feedback Lounge, responding officers were able obtain the credit card receipt the defendant used, and learn the defendant's name and his home address, which was only a mile or so away. 25RP 113, 118, 143, 146; 29RP 78-81. It was less than an hour after the shooting that officers went to the defendant's door, and when he answered, he was placed under arrest. 26RP 183; 29RP 77, 90-91, 134, 140-45. The defendant, who appeared intoxicated, was argumentative, telling the officers that it was "stupid" that he was

[2] Vause actually drove to a nearby elder care facility that looked somewhat like a hospital. 26RP 185; 29RP 19-25. At the facility, Vause checked Hood's pulse, but it was already too late. 27RP 120.

being placed under arrest. 29RP 146, 171, 182. When placed in a patrol car and informed that anything he said in the car would be recorded, the defendant responded, "fuck you." 29RP 181-82.

Later that morning, the defendant was taken to Harborview for a blood draw. 32RP 101-02. Some five hours after the shooting, the defendant's blood alcohol level was still over a .20. 33RP 103-04.

At approximately 5:00 a.m., after returning from Harborview, the defendant was interviewed by homicide detectives. 32RP 14. The interview was audio and video recorded. Trial exhibit 135 (the DVD); trial exhibit 137 (transcript).

The defendant told the detectives that he had been drinking martinis at the Feedback Lounge and that he had gone out to his car, which he said was parked right in front of the Beveridge Place Pub, to go home. Trial exhibit 137 at 6-8. He said that he had his .45 under the seat of his car. Id. at 7, 9. Asked what happened then, the defendant responded, "I don't fucking know." Id. at 14. He was asked if he remembered there being any trouble, the defendant responded, "I don't know. I really don't know." Id. at 15. Pressed further, the defendant said that "the only thing I can think of...is that these guys must have...made an aggression on me." Id. at 16. Upon further questioning, the defendant said "I remember now," there were two guys "fucking with me...like

trailing me, you know, to my car and talking shit." Id. at 21. He added that "[s]ome of it was racial, I remember now." Id. at 23. The defendant said that when he got into his car, the two men tried to get into the car with him, so he pulled his gun and shot. Id. at 25.

After confirming his claim that the shooting occurred at his car, the detectives told the defendant that shell casings had been found way down the street. Id. at 27. The defendant asserted that "I'm not lying...those guys attacked me right at my car." Id. He asserted that the men tried to get into his car but it was locked. Id. at 28. He professed that he did not remember getting out of the car. Id. He repeated, "these fucking guys, they were attacking me, you know, it was two of 'em, you know, right there at my car." Id. at 29. When asked why he didn't just drive away, the defendant changed his story and said that the doors of his car were not locked. Id. at 38. He said that when they opened the door he exited the car and that "I must have" had the gun in his hand. Id. at 40.

Later in the interview, the defendant said that although he never saw a weapon, he believed that the men were armed "just by their, the way they were acting, you know, like and the way they were talking." Id. at 44. He then told the detectives that he did not remember getting out of his car or grabbing his gun. Id. at 46. The defendant never mentioned Hood having picked up a shovel or him shooting Hood. 33RP 156-57.

In a search of the defendant's house, the murder weapon -- a Colt .45 semiautomatic handgun, the defendant's car keys with a BMW fob, a cell phone, and an extra magazine for the .45 were found on the kitchen table. 29RP 93-94; 30RP 143-47; 36RP 93, 96, 116-20. The gun was loaded with a round in the chamber. 30RP 143-45. In the defendant's BMW that was parked in the garage were two more magazines for the .45. 26RP 193; 29RP 83; 31RP 29. When the police went to impound the car, it started with no trouble. 26RP 194.

Officers processing the scene of the shooting recovered the shovel with blood on it, three .45 caliber shell casings, and one fired bullet, all on the sidewalk in close proximity to each other, all in front of Morgan Junction Park. 25RP 113, 117; 26RP 67-68, 130-76. All three cases were fired from the .45. 36RP 116-20. Based on the defendant's statement, detectives examined the passenger side of the defendant's car but noticed nothing that would indicate any kind of disturbance or attack had taken place. 30RP 172; 36RP 180-81.

The defendant called a private forensic psychologist, Doctor Mark Cunningham, to testify about the defendant's mental state at the time of the crime. Doctor Cunningham concluded that due to all of the abuse, racism, and trauma the defendant had seen, and was subjected to, during his younger years at the hands of abusive family members, the police and

while serving long periods of time in prison, the defendant suffered from post-traumatic stress disorder (PTSD), had a deep seeded distrust of law enforcement, paranoia, intense feelings of personal vulnerability, and that if the shooting occurred how the defendant told him it had occurred, the actions of Vause and Hood could have caused the defendant to believe he was in imminent danger of death or great personal injury. 37RP 160-62. He added that the defendant's reported memory loss could be the result of the PTSD and stress of the situation. 37RP 161.

The defendant then testified and said that he had been drinking at the Feedback Lounge and that he probably drank more than usual. 42RP 170-74. He said that he had never seen Vause or Hood before and that nothing happened while in the Feedback Lounge. 42RP 177.

When he left, he said that he was "feeling it," but that he wasn't drunk and that he just wanted to get home before it really hit him. 42RP 177-78. He claimed that when he walked outside, Vause and Hood said "look at that nigger there," and "his mammy must have taught him how to walk like that." 42RP 179. The defendant testified that he was not angry and just assumed that Vause and Hood were drunk. 4RP 179-80.

The defendant said that after he got into his car, the passenger door was yanked open and one of the two men (would have been Vause) was there poised to climb inside. 42RP 182. The defendant said that because

of a motion the man made, he thought he had a knife. 42RP 182. The defendant then reached over and pulled the door shut. 42RP 184. He opined that he must not have shut the door all the way because he was not able to lock the doors. 42RP 185-86. He also grabbed his gun. 42RP 184.

The defendant testified that the second man, who turned out was the victim, Hood, started banging on the back of his car. 42RP 184. In "panic mode," the defendant said he turned the ignition too hard and he could not start his car. 42RP 183-84. When he looked up, he said he could not find the other man – Vause. 43RP 137.

Proclaiming that he felt like a "sitting duck," the defendant decided to get out of his car and walk north on California Avenue where there was more light. 42RP 188. When he got out, he could not see the person that he thought might have a knife – Vause. 42RP 193. This, the defendant explained, "was causing a lot of anxiety within me." 42RP 193.

The defendant testified that as he walked north on California Avenue, Hood walked parallel to him, yelling racial epithets at him. 42RP 194, 197. The defendant thought he was being ambushed because every time he looked around for Vause, Hood would "start hollering" with increasing "intensity" to get his attention. 42RP 195; 43RP 114.

When they got up as far as Morgan Junction Park, Hood sprinted forward, pulled a shovel out of the truck, took a batter's stance and said he was going to "knock your nigger head off." 42RP 198-99. He asserted that Hood was coming towards him. 43RP 118. The defendant testified that "I believed he was going to kill me." 42RP 200. However, the defendant professed that he did not remember pulling out his gun, did not remember firing the gun and did not remember shooting Hood. 43RP 86, 117-18. In conjunction with this claim, on cross the defendant had to admit that he did not know how Hood reacted when he pulled out his gun or whether Hood turned away and tried to get into the truck when he shot him. 43RP 144. Instead, he claimed that the next thing he remembered was being at home when the police showed up. 42RP 201.

In testifying, the defendant admitted the obvious, that the story he told the police and the story he told the jury were different. 42RP 211-12. He said that he lied to the police because he didn't trust them. 42RP 212. He claimed that he never mentioned the shovel because he thought that if he did, the police would make it disappear. 42RP 212. He admitted that when he told the detective he did not remember anything, he was lying. 43RP 32-33. In fact, he admitted that he withheld facts from the police when he thought it suited his purpose. 43RP 86. Asked if his intoxication level affected his judgment on the night of the shooting, the defendant said

he was 100% sure he accurately perceived what was happening. 43RP 156.

Making the defendant's version of the shooting highly suspect was the testimony of four independent witnesses. Alex Rivet, Brian Knight and some friends were at the Beveridge Place Pub at the time of the shooting. 25RP 41.[3] They arrived around 9:00 p.m. and sat just 10 feet from the front door. 25RP 43, 72; Pretrial exhibit 57 at 12. Around 9:30, Knight went outside to have a cigarette. Id. at 12, 14-16. Knight walked about 20 feet north from the front door of the Beveridge Place Pub to smoke his cigarette. Id. at 17, 50. Knight happened to be standing about ten feet from the defendant's car. Id. at 37.

Knight was outside for a couple of minutes smoking his cigarette when he heard a voice and saw the passenger door of a red pickup truck open. Id. at 21, 24. Knight could see a black male standing parallel to the pickup. Id. at 26. Knight could not see anyone else outside of the pickup. Id. at 27. Knight watched as the black male pulled out a gun and fired multiple shots into the pickup. Id. at 27-28. Prior to the shooting, Knight

[3] Knight was deposed before trial because his job with the defense department would have him overseas during trial. His video deposition was played for the jury. 24RP 130-31; trial exhibit 9. A transcript of the deposition was provided to the jury as an aid when listening to the deposition. 24RP 130. It does not appear that the transcript was placed into evidence. As a result, the State will cite to pretrial exhibit 57, another copy of the transcript that was used during pretrial motions. Some minor redactions were made and the State will not cite to them, however, the transcript will likely be helpful in reviewing the record.

did not see or hear anything out of the ordinary happening on the sidewalk. Id. at 46. He thought that the defendant had walked past him before the shooting, but he wasn't positive. Id.

After witnessing the shooting, Knight backpedaled into the bar and told Rivet to come on out. Id. at 34. Rivet testified that he had heard the shots from inside. 25RP 50. He did not testify to seeing or hearing any disturbance in front of the Beveridge Place prior to hearing the shots. 25RP 47-48, 50-53, 73.

When Knight and Rivet stepped back outside, they saw the shooter put the gun into his jacket and start walking in their direction. Pretrial exhibit 57 at 33; 25RP 48, 52-53. The shooter calmly walked down the sidewalk, opened his car door and got inside. Pretrial exhibit 57 at 37; 25RP 54-55. The defendant sat in his car for about half a minute and appeared to be texting someone on his cell phone. Pretrial exhibit 57 at 37-38; 25RP 55, 57. The defendant then started his car with no apparent problems, pulled a U-turn and drove away. Pretrial exhibit 57 at 43, 47; 25RP 57. Rivet would later give the police the license number of the car. 25RP 64.

Rivet testified that prior to the defendant driving off in his BMW, Rivet looked up and could see feet hanging out of the open passenger door of the pickup truck. 25RP 58. He watched as the driver of the truck

hunched over the passenger, then sat up, started the truck and pulled a U-turn while pulling the door shut. 25RP 58-59.

Joel Vandenbrink, whose girlfriend works at the Beveridge Place Pub, happened to be driving down the street at the time of the shooting. 30RP 49-52. Driving slowly and looking over to see if he could see his girlfriend, Vandenbrink heard a noise and looked over to see a man standing outside the passenger door of a truck, with his arm outstretched, firing a gun into the truck. 30RP 54-55. It appeared to Vandenbrink that the man was firing at someone in the passenger seat. 30RP 57. Except for just the seconds before the shooting, Vandenbrink did not hear any yelling or screaming. 30RP 54. After the shooting, Vandenbrink watched as the shooter walked south on California Avenue to a blue BMW, get in, start the car and drive away. 30RP 63-69.

Gianatta Griffits, General Manager of the Feedback Lounge, was having a cigarette on the back side of the bar when she heard shots fired. 24RP 56, 58. She did not describe hearing any yelling prior to hearing the shots. 24RP 56-58.

In sum, none of the independent witnesses heard or saw the yelling, commotion and attack that the defendant professed occurred at his car and along the sidewalk. In addition, none of the witnesses described seeing a man rushing at the defendant as he described.

Additional facts are included in the sections they pertain.

D. ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE LESSER OFFENSE OF FIRST-DEGREE MANSLAUGHTER

Charged with second-degree murder, the jury convicted the defendant of the lesser offense of first-degree manslaughter. The defendant contends that the trial court erred in instructing the jury on the lesser offense because, he claims, there was no factual basis to support the lesser offense. The defendant is mistaken. The facts presented at trial met the requirement for the giving of the lesser included offense instruction, i.e., the evidence supported an inference that the lesser crime was committed to the exclusion of the greater crime.

In Washington, a jury is permitted to find a defendant guilty of an offense that is necessarily included within the charged offense, i.e., a "lesser included" offense. RCW 10.61.006. A two-part test serves as the basis for the analysis regarding whether the jury should be instructed on a lesser offense. First, each of the elements of the lesser offense must be a necessary element of the charged offense. Second, the evidence in the case must support an inference that only the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first

prong of the test is referred to as the "legal prong," the second prong as the "factual prong." Id.

The elements of second-degree intentional murder are that the defendant intends to cause the death of another person, but without premeditation, and that the defendant causes the death. RCW 9A.32.050(1)(a). The elements of first-degree manslaughter are that the defendant recklessly causes the death of another person. RCW 9A.32.060(1)(a). A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. RCW 9A.08.010(1)(c). When a statute provides that recklessness suffices to establish an element of an offense, such element also is established if a person acts intentionally or knowingly. RCW 9A.08.010(2).[4]

As far back as 1933, the Supreme Court held that manslaughter is a legal lesser of intentional murder. State v. Berlin, 133 Wn.2d 541, 551, 947 P.2d 700 (1997) (citing State v. Foley, 174 Wash. 575, 25 P.2d 565

[4] A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a). A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense. RCW 9A.08.010(1)(b).

(1933)). Here, the defendant does not contest that first-degree manslaughter is a legal lesser of second-degree intentional murder and that it would have been appropriate for the trial court to instruct the jury on the lesser charge if the factual prong had been established.[5]

A lesser included instruction is available to both the prosecution and the defense if the lesser is a legal lesser and the facts support the giving of the lesser offense instruction. Berlin, at 548. In determining whether the record supports an inference that only the lesser offense was committed, an appellate court will review the record in the light most favorable to the party requesting the instruction, here, the State. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

While it is not enough that the jury might simply disbelieve one party's evidence, the rule "has no reference to the weight of testimony, but has applicability only to those cases where there is ***no testimony whatever to weight tending to show the commission of the lesser degree of crime.***" Foley, at 580 (emphasis added). "Conversely, it is also the rule that the lesser degree of crime must be submitted to the jury along with the greater degree unless the evidence positively excludes any inference that the lesser crime was committed." Id.

---

[5] Although manslaughter is not a legal lesser of *felony* murder; where, like here, the murder charge was based on the alternative means of *intentional* murder and f*elony* murder, a jury is still permitted to return a verdict on the lesser charge of manslaughter. Berlin, at 553.

The defendant asserts that because this was a self-defense case, the jury could only have found him guilty--if at all--of having intentionally fired the shots that killed Hood and with the intent to kill Hood. In other words, the defendant asserts that he is guilty of intentional murder or nothing at all. This is incorrect. The defendant's focus is too narrow, centering only on the actual pulling of the trigger and a version of the shooting he asked the jury to accept. However, it must be remembered that the defendant testified that he had no memory of pulling his gun out, no memory of the gun being in his hand, no memory of pulling the trigger and no memory of shooting Hood. 43RP 86, 117-18. Thus, his theory regarding his *mens rea* was built on circumstantial evidence, evidence that could be interpreted in many different ways.

Here, there are three factual theories of the case that support the giving of a manslaughter instruction. First, the defendant's reckless actions and decisions leading up to and including his shooting of Hood provided sufficient facts for the court to give the jury the lesser offense alternative. Second, the jury could reasonably find that the defendant's extreme intoxication affected his mental state, lowering his *mens rea* and providing a basis to give a manslaughter instruction. And third, the nature of the shooting itself provided a basis to give a manslaughter instruction because it was a reasonable inference that it was not necessary to fire any

shots once the defendant pulled out his gun, let alone to fire three shots, two shots being fired directly into Hood's back.[6]

The defendant's expert, Doctor Cunningham, testified that the defendant suffers from severe PTSD with symptomology that includes an intense distrust of other people and paranoia. 37RP 160-61, 217; 38RP 5, 38. Although diagnosed years ago with paranoia, the defendant refused to believe his evaluators and he did not take any medications to address his symptoms. 38RP 38-39; 43RP 50, 107. According to Doctor Cunningham, the defendant perceived almost everyone as being a potential threat. 38RP 69-70.

The defendant exhibited PTSD and paranoia symptomology in his daily life. 42RP 162; 43RP 59. He possessed a gun, knowing it was illegal for him to do so, and he carried the gun everywhere he went because there were always possible threats about. 38RP 65-67; 43RP 65-66. If he was amongst strangers, he made sure he carried the gun on his person. 43RP 65. If amongst friends, he would leave the gun in his car. Id. Further symptomatic of the defendant's mental state was his profound distrust of others, his need to sit with his back to walls so that he could observe anyone entering the room, and his quickness in ascribing nefarious motives to persons he might find suspicious. 38RP 5, 65, 69-70,

[6] None of the three theories of the case are mutually exclusive of the others. The facts of each theory substantially overlap.

39RP 24-25; 43RP 59. Doctor Cunningham testified that the defendant's PTSD could have led the defendant to believe he was in imminent danger on the night of the shooting. 38RP 81.

On the night of the shooting, possessing this symptomology, the defendant proceeded to get hammered on his drink of choice--vodka martinis. 42RP 171-74, 177. Despite the passing of five plus hours from the time he shot Hood until his blood was drawn, the defendant's blood alcohol level (BAC) was still above .20; the equivalent of having almost nine martinis in his system. 35RP 103-04. With an average burn-off rate of .02 per hour, the defendant's BAC level at the time he shot and killed Hood would have placed him at three and a half times the legal limit to drive, with the equivalence of 12 to 13 martinis in his system. 35RP 115-31, 140-41.

According to the defendant, after Vause had opened his car door, he was able to close the door, and when he looked around, Vause was gone. 43RP 137. Still, despite being alone in his car, with the doors closed, keys in hand, cell phone on his person, Vause nowhere in sight, and a fully-loaded .45 semiautomatic sitting right at his feet, the highly intoxicated defendant was in "panic mode," a "sitting duck," so he armed himself with his .45 and got out of the car. 42RP 183, 187. Somewhere along the line (he did not testify when this occurred), the defendant had to

take off the safety, chamber a round, and cock the gun before it could be fired. It is reasonable to infer he did this when he first armed himself.

Once outside his car, with one person in sight (Hood), who the defendant had no reason to believe was armed, and with Vause nowhere to be seen, the armed and intoxicated defendant made the decision to walk away from the safety of his car, the safety of two restaurant/bars within feet of his car, and proceed in the same direction as Hood towards Morgan Junction Park. The defendant chose this course of action over staying in his car and trying to start it again, calling 911, showing his weapon and saying "leave me alone," calling out for help, or walking into the bar right next to his car. The defendant's actions can reasonably be inferred to have compelled Hood to grab a shovel to quell what he perceived as a threat. This then led the defendant to shoot and kill Hood.

To infer means "to derive as a conclusion from facts or premises." Merriam-Webster's Collegiate Dictionary at 639 (11th ed. 2003). Under the totality of the fact, in deciding to give a manslaughter instruction, the trial court could reasonably infer that the defendant's actions and decisions, especially when considering his level of intoxication and paranoia, created the circumstances that resulted in the shooting of Hood, that he did not initially intend for the shooting to occur, but that he knew

of and disregarded a substantial risk that death would result from his actions.

In conjunction with the above, and as an independent basis for the giving of a manslaughter instruction, was the defendant's level of intoxication. State v. Collins,[7] and State v. Jones,[8] are good examples of how intoxication provides a basis for the giving of a lesser offense instruction.

At approximately 12:45 a.m., Collins turned to a man seated next to him in a tavern and shot him six times. Collins then walked out the door. Collins was later arrested and after he sobered up, he provided a statement to the police. Collins said that the bartender had given him five $20 bills which he had placed on the bar. Collins said that he believed the man sitting next to him made a grab for the money and "he thought he had seen the flash of a knife in the victim's possession." Collins said that he remembered the noise of the shooting but he had no memory of the shooting itself. The next thing he remembers is going home and putting the gun in the linen closet. Collins, at 3-4.

Collins was convicted of second-degree murder. However, his conviction was reversed because the trial court had failed to provide the

---

[7] 30 Wn. App. 1, 632 P.2d 68, rev. denied, 96 Wn.2d 1020 (1981).

[8] 95 Wn.2d 616, 628 P.2d 474 (1981).

jury with a manslaughter option. The court noted that the law provides that "whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or a degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state." Id. at 14 (citing RCW 9A.16.090). Where there is evidence, the court said, of extreme intoxication, it is error not to provide a manslaughter instruction when requested because the jury could find the defendant guilty of "manslaughter, an unintentional killing, by reason of his intoxicated condition." Id.

The defendant in Jones was convicted of second-degree murder for the stabbing death of Dudley Bates. One day Jones happened to observe Bates engaged in a homosexual act with another person. The next day, Jones spent much of the afternoon drinking beer with some friends at Bates' apartment. He asked Bates if he was gay. Bates responded by grabbing a kitchen knife and approaching Jones in a menacing manner. Jones said that "he tried to get me," that his finger got cut whereupon Bates dropped the knife. Jones pushed Bates back and picked up the knife. A struggle ensued whereby Bates was stabbed multiple times. Jones, at 617-18.

The Supreme Court reversed Jones' conviction because the trial court had refused to give a manslaughter instruction. The Court held that

"[t]here were, then, two possible ways the jury could have decided that appellant lacked the intent necessary for a conviction of second degree murder. They could have found either that he was so intoxicated as to be unable to form the intent to kill or, alternatively, that he acted in self-defense, but recklessly or negligently used more force than was necessary to repel the attack." Id. at 622-23.

The ruling in Jones also highlights the third theory supporting the giving of a manslaughter instruction, the jury could have found that the defendant acted in self-defense when he pulled out his gun and pointed it at Hood, but that he acted recklessly in firing at all and/or acted recklessly in firing three shots, two into Hood's back. The defendant can only opine what his actual intent was, or what his actual perceptions were, after he pulled out his gun and pointed it at Hood. He testified he doesn't remember even pulling out his gun.

Under the facts, it is a reasonable inference that simply pulling out his gun and pointing it at Hood would have stopped any further assaultive act by Hood -- it was not necessary to fire. Moreover, akin to bringing a knife to a fist fight, having a gun pointed at a person who is holding an unwieldy object that they must swing at you to hit you, is a mismatch of epic proportions. No matter how much the defense argues the shots were fired in rapid succession, the jury could reasonably infer that the two shots

fired directly into Hood's back were unnecessary, and to fire shots in rapid succession reckless.

2. THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE STATEMENTS HE MADE TO THE POLICE

At trial, the defendant moved to suppress post-arrest statements he made while being questioned by Detectives Cloyd Steiger and Jason Kasner. He claimed, among other things, that the detectives did not "scrupulously honor" his prior invocation of his right to remain silent and therefore when he later waived his right to remain silent, it was not voluntary. The trial court denied the defendant's motion. The court found that the defendant's prior invocation had been scrupulously honored and that ample time had passed before the detectives provided fresh Miranda warnings after which the defendant agreed to talk. The trial court's decision was correct.

a. Relevant Facts

The report of shots being fired came in at 9:52 p.m. 5RP 53. Police arrived at the defendant's home at 10:36 p.m. 5RP 55. He was taken into custody at 10:49 p.m. 5RP 28-30; CP 2277. He was placed in handcuffs and escorted to the bottom of his porch steps. 5RP 30. At 10.51 p.m., he was read his Miranda warnings by Officer Anthony

Belgarde. 5RP 30, 35, 64. After each of his rights was read to him, he was asked if he understood, to which he replied that he did. 5RP 40-41.

The defendant was described as "somewhat compliant," not physically resisting but argumentative and using a great deal of profanity. 5RP 31-32, 39, 61. Asked if he wanted to talk, the defendant responded "no" in a loud aggressive manner. 5RP 41.

Officer Belgarde complied with the defendant's assertion of his right to remain silent. He did not ask the defendant any questions other than asking what his name was.[9] 5RP 43, 49. Officer Belgarde noted that the defendant smelled of alcohol, swayed at times and did not have very good balance. 5RP 44. The defendant was escorted to a patrol vehicle where he was placed on the push bar before ultimately being placed in the back of a patrol vehicle. 5RP 46, 65.

Officer Kyle Galbraith transported the defendant to the South Precinct. 5RP 131-33. Officer Galbraith did not ask the defendant any questions. 5RP 134. Other than to inform the defendant that the inside of the patrol car was audio and video recorded, Officer Galbraith did not have any conversation with the defendant. 5RP 134. When informed that the inside of the patrol car was being recorded, the defendant responded,

[9] A request for routine information necessary for basic identification purposes is not considered impermissible interrogation. See State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992), abrogated by In re Cross, 180 Wn.2d 664, 327 P.3d 660 (2014).

"fuck you." 5RP 134. Officer Galbraith described the defendant as being intoxicated, unsteady on his feet and somewhat belligerent but otherwise calm. 5RP 134-35. He noted that at one point, the defendant began chuckling to himself. 5RP 137.

At the precinct, the defendant was placed in a holding cell for approximately one hour. 5RP 139. Officer Galbraith then transported the defendant to the Homicide Unit at Police Headquarters. 5RP 137.

At 12:28 p.m., the defendant was placed in an interview room that was audio and video recorded. 5RP 155-56; 6RP 83, 86; CP 2277. His handcuffs were removed and he was allowed to sit in the chair he preferred. 5RP 55; 6RP 83; CP 2277. Other than to ask if he wanted some water, coffee or chips, the detectives did not ask the defendant any questions. 6RP 83. Per his request, the defendant was provided with some water. 6RP 87.

It was the judgment of both detectives that the defendant was too intoxicated to do anything with at that time so he was left in the interview room to sober up while the detectives went about other business. 5RP 157; 6RP 84, 122. The detectives occasionally checked the viewing monitor to see if the defendant was okay. 6RP 88. It appeared that the defendant spent most of the time in the interview room sleeping. 5RP 158; 6RP 88.

At 3:06 a.m., once a warrant had been obtained, the detectives removed the defendant from the interview room to take him to Harborview for a blood draw to determine his intoxication level. 5RP 157; 6RP 25, 87-88. Although the detectives had not asked the defendant any questions, as he was being driven to Harborview, the defendant told the detectives that he did not want to talk. 6RP 21.

Once at Harborview, a nurse drew a sample of the defendant's blood. 5RP 159. The detectives and the defendant were at Harborview for approximately 45 minutes. 5RP 160. The defendant was calm and cooperative during the blood draw. 5RP 161. It was the detectives' opinion that the defendant was now more lucid and that he had sobered up somewhat from when he first arrived at the Homicide Unit. 5RP 161.

Upon leaving Harborview, the intent was to drive the defendant to the King County Jail where he would be booked. 5RP 161. When they arrived at the detectives' car, Detective Steiger read the defendant his Miranda warnings. 5RP 162, 164. The defendant stated that he understood his rights. 5RP 165. The defendant did not in any fashion indicate that he still wished to exert his right to remain silent. 5RP 165.

While on the way to the jail, Detective Steiger asked the defendant if he wanted to tell his side of the story. 5RP 165. The defendant said he did not know what had happened. 5RP 165. When they arrived at the

sally port at the jail, the defendant asked to see a photo saying that he did not even know what the guy looked like who had been shot. 6RP 92. Detective Steiger said he had a photo of the victim at his office and asked the defendant if he wanted to go back to the office and have a talk. 6RP 92; CP 2278. The defendant responded that he did. 6RP 92; CP 2278. Detective Steiger then drove across the street to the police headquarters. 6RP 92.

At 4:05 a.m., the defendant was placed back in the same interview room at the Homicide Unit. 6RP 93; CP 2278. The defendant's handcuffs were removed and he was asked if he wanted something to eat or drink. Pretrial exhibit 23; CP ___, sub # 177 at 3, 4.[10] Fresh water was provided. Id. The defendant was again allowed to decide which chair he wanted to sit in. Id. He was then asked if he needed to use the bathroom and he was allowed to do so. Id. Once ready, Miranda warnings were read to him for the third time and he was informed that everything in the room was being recorded. Id. at 4-6. The defendant acknowledged that he understood his rights and allowed himself to be interviewed. Id. at 6.

b. The Trial Court's Well-Reasoned Decision

An in-custody suspect's statements made to law enforcement officials during questioning are admissible at trial if the State proves by a

[10] Pretrial exhibit 23 is a DVD of the defendant's interview. A transcript of the interview is attached to the State's motion to admit the defendant's statements. CP __, sub # 177.

preponderance that the suspect was informed of his or her right to remain silent and right to an attorney and that the suspect knowingly, intelligently and voluntarily waived those rights. Miranda v. Arizona, 384 U.S. 436, 457-58, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Wheeler, 108 Wn.2d 230, 237-38, 737 P.2d 1005 (1987). Once Miranda warnings have been given, if the suspect indicates that he or she wishes to remain silent, questioning must cease. Miranda, 384 U.S. at 473-74. However, an invocation of the right to remain silent does not last into perpetuity. Where a suspect invokes his or her right to remain silent, the police may later resume questioning if the suspect's original request to cease questioning was "scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 104-06, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). That is what happened here.

In creating a rule that allows for the resumption of questioning under certain circumstances, the Supreme Court was careful not to create a rule that would have absurd, unintended or unwanted consequences. The Court recognized the absurdity of a rule wherein a suspect's invocation of the right to remain silent would last forever. Mosley, at 101-02. The Court also recognized the absurdity of a rule that would find any statement taken after a suspect has invoked to be the product of compulsion and inadmissible even if the statement was volunteered by the suspect without

any further interrogation whatsoever. Id. Both situations would create "wholly irrational obstacles to legitimate police investigation activity, ***and*** deprive suspects of an opportunity to make informed and intelligent assessments of their interests." Id. (emphasis added).

On the other hand, the Court was also acutely aware that to permit the continuation of custodial interrogation after just a momentary cessation "would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned." Id.

In holding that the police may resume questioning despite an earlier invocation of the right to remain silent, the Court identified a number of factors that trial courts may consider when determining whether the subsequent waiver of the right to remain silent was voluntary. Id. at 104-05. The Washington State Supreme Court articulated the Court's instructions as follows:

> [T]he rule that we draw from Miranda, Mosley, and Innis[11] is that the police may question a suspect who has once cut off questioning by requesting an attorney as long as (1) the right to cut off questioning was scrupulously honored, (2) the police engaged in no further words or actions amounting to interrogation before obtaining a valid waiver or assuring the presence of an attorney, (3) the police engaged in no tactics which tended to coerce the suspect to change his mind, and (4) the subsequent waiver was knowing and voluntary.

[11] Referring to Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

State v. Pierce, 94 Wn.2d 345, 352, 618 P.2d 62 (1980), overruled in part on other grounds by Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (addressing whether law enforcement officers can recontact a defendant after that defendant has asserted his or her right to counsel). In other words, there must not be a refusal to discontinue the interrogation upon invocation and there must not be persistent and repeated efforts to wear down the suspect's resistance and make him change his mind. State v. Cornethan, 38 Wn. App. 231, 235, 684 P.2d 1355 (citing Mosley, at 105-06), rev. denied, 103 Wn.2d 1007 (1984).

In Mosley, the defendant was arrested in the afternoon in connection with a robbery and advised of his Miranda warnings, upon which he stated that he did not want to answer any questions. Interrogation promptly ceased. Mosley was then placed in a jail cell. After about two hours, Mosley was brought to the Homicide Bureau office, read fresh Miranda warnings and questioned about a homicide, upon which Mosley made a statement that was used against him at his subsequent trial. The Supreme Court affirmed the trial court, finding that use of Mosley's statements was proper, that the police conduct reasonably respected Mosley's initial refusal to answer any questions and he voluntarily waived his right to remain silent. Mosley, at 104-05.

Here, upon being arrested, the defendant was immediately read his Miranda warnings by Officer Belgarde. The defendant stated that he understood his rights and he invoked his right to remain silent. This occurred at 10:51 p.m. Officers at the scene complied with the defendant's invocation of his right to remain silent. The officers did not ask the defendant any questions, nor did they pressure him in any manner to reconsider his position.

Next, Officer Galbraith transported the defendant to the South Precinct and placed him in a holding cell before transporting him to the Homicide Unit an hour later. Officer Galbraith did not ask the defendant any questions while the defendant was in his control, nor did he pressure him in any manner to reconsider his right to remain silent.

This is also true in regards to the time the defendant spent at the Homicide Unit prior to being transported to Harborview. When he arrived at the Homicide Unit, the defendant was not asked any questions about the shooting. Instead, he was asked if he wanted something to drink or eat, provided with some water and was given a chair to sit while waiting in an interview room. At just before 4:00 a.m., for the very first time since his invocation over five hours earlier, the defendant was asked if he wanted to

talk with the detectives and he was provided with fresh Miranda warnings. At this point, the defendant made the conscious decision to talk.[12]

Over this five hour period, the defendant had time to sleep. Over this five hour period, the defendant had time to sober up. Over this five hour period, the defendant had time to contemplate his situation and his earlier decision not to talk. Considering his earlier intoxicated and agitated state, this may have been his first opportunity to make a rational decision.

Equally important during this five hour period was the absence of any attempt to wear down the defendant's resistance to talking or continued questioning after the defendant first invoked. In other words,

---

[12] On appeal, the defendant asserts that he invoked three times, once to Officer Belgarde at the scene, once in the patrol car when he said "fuck you" to Officer Galbraith, and once to the detectives while being transported to Harborview and telling them that he did not want to talk. This is not exactly correct; the defendant invoked but once.

The defendant cites to State v. Reuben, 62 Wn. App. 620, 814 P.2d 1177, rev. denied, 118 Wn.2d 1006 (1991), for the proposition that by saying "fuck you" to Officer Galbraith, he was invoking his right to remain silent. In Reuben, the officer had just finished reading the defendant his Miranda warnings and had asked him if he understood his rights, to which Reuben responded, "go fuck yourself." Reuben had not yet invoked to any other officer. Under the circumstances, the court correctly held that a reasonable officer would understand Reuben's vulgar response as his way of invoking his right to remain silent. Here, the defendant had already been read his rights and invoked. Officer Galbraith was not attempting to ask the defendant any questions, nor was he seeking to determine if the defendant now wished to talk. Instead, Officer Galbraith was merely informing the defendant that if he did speak while in the patrol car, it would be recorded. At best, the defendant's vulgarity was simply his way of exhibiting that he was continuing to exercise his already invoked right.

Similarly, the defendant's statement to the detectives on the way to Harborview amounted to nothing more than a reminder that he did not wish to speak to the police. The detectives were not attempting to question the defendant nor attempting to determine if he had changed his mind about speaking to the police. In short, the defendant invoked once, an invocation that continued until such time as he ultimately agreed to discuss the shooting with the detectives.

none of the concerning behavior articulated by the Supreme Court in Mosley occurred here. Thus, the trial court reasonably found that the defendant knowingly, intelligently and voluntarily waived his right to remain silent, a decision that was free of coercion or overbearing behavior on the part of the police.

Instead of identifying any coercive behavior by the police, the defendant focuses on artificial differences between his case and Mosley *et al.* Def. br. at 36 ("Based on a comparison of the facts in Mosley, Seattle Police failed to 'scrupulously honor' Chambers' invocation of his right to silence"). For example, the defendant points out that the detectives questioned him about the same crime for which he was arrested, while in Mosley, the defendant was arrested for a robbery when he invoked but he was later questioned about a homicide. The defendant even goes so far as to assert that this difference may be dispositive. Def. br. at 39. It is not.

For support, the defendant cites to State v. Brown, 158 Wn. App. 49, 240 P.3d 1175 (2010), rev. denied, 171 Wn.2d 1006 (2011). The court in Brown stated that in State v. Reuben, "[w]e have held that limiting the scope of an interrogation [after invocation] to a different crime is required." Brown, at 59. However, the court in Brown was mistaken. In Reuben, the defendant invoked to one officer, followed almost

immediately by a detective entering the room and questioning Brown about the same crime the officer had arrested him on. The court held that where the detective (1) did not provide fresh Miranda warnings, (2) did not wait a significant period of time (or any time) ***and*** (3) questioned Brown about the same crime he had just declined to talk about, the trial court was in error in finding that Brown voluntarily waived his right to silence. Reuben, at 626. The court in Reuben never held that questioning on a different crime is required. The Supreme Court in Mosley made clear that questioning can occur on any subject and that whether questioning occurs on a different subject matter is simply a factor that the trial court may consider in determining whether the subsequent waiver was voluntary. Mosley, 101-04.

The defendant also cites to Mosley, wherein two hours was held to be a sufficient period of time between invocation and the attempt to re-question the suspect, and here, where the ***last time*** the defendant stated that he did not want to talk, and the attempt to re-question him, was just short of one hour. Mosley, however, did not set any bright-line amount of time that must pass between invocation and a second attempt to seek a waiver. See, e.g., United States v. Hsu, 852 F.2d 407, 411 (9th Cir. 1988) (court rejects request to create a bright line rule barring any questioning that takes place within one hour of an invocation of Miranda warnings –

court finds that an elapsed time of "at most" 30 minutes did not render Hill's subsequent waiver involuntary under the relevant facts); Hill v. Kemp, 833 F.2d 927, 929 (11th Cir. 1987) (the critical factor is a "cooling off" period followed by a fresh set of warnings). Rather than any bright line rule, the voluntariness of a confession is determined by examining the totality of the circumstances in which the confession is made. State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984).[13]

Here, based on the totality of the circumstances, the trial court properly found that the defendant's waiver of his right to remain silent was voluntarily made. The defendant did not testify and there is no evidence that the police did not respect his initial invocation or that they engaged in coercive tactics that wore the defendant down and got him to change his mind. A trial court's determination of voluntariness will not be disturbed on appeal if there is substantial evidence in the record from which the trial court could have found by a preponderance that the confession was voluntary. State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988). The

[13] See also Brown, supra, (two hour period with no evidence police attempted to wear down suspect was sufficient evidence of voluntariness); State v. Boggs, 16 Wn. App. 682, 559 P.2d 11 (fresh Miranda warnings can demonstrate that a defendant's earlier decision to remain silent was recognized by the police and also reminds the suspect that he can continue to exercise his rights), rev. denied, 88 Wn.2d 1017 (1977); State v. Vannoy, 25 Wn. App. 464, 610 P.2d 380 (1980) (a little over three hours for one defendant and a little less than four hours for another defendant, with no evidence of coercive conduct, was sufficient).

defendant has failed to show that the trial court did not have a sufficient basis to find that his waiver was voluntary.

In any event, any error was harmless. The admission of a confession obtained in violation of Miranda is subject to harmless error. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Under Washington's "overwhelming untainted evidence" standard, error is harmless if the untainted evidence is so overwhelming it necessarily leads to a finding of guilty. Guloy, at 426.

Here, two aspects of this case lead to this result. First, in the statements he made, the defendant did not confess. Second, the defendant raised a pseudo mental defense, claiming his actions and lack of memory were the result of PTSD. As a result, his actions and statements at or near the time of the crime would, at a minimum, have been admitted as impeachment of the defendant's expert witness and his own testimony. Thus, the jury would have heard the defendant's statements regardless.

3. THE POLICE LAWFULLY CONDUCTED A LIMITED PROTECTIVE SWEEP OF THE FRONT ROOM AND ATTACHED KITCHEN AFTER ARRESTING THE DEFENDANT AT HIS FRONT DOOR

The defendant moved under CrR 3.6 to suppress evidence (the murder weapon, car keys, cell phone and gun magazine) that was observed

on his kitchen table during a protective sweep conducted in effectuating his arrest at his front door, evidence that was later seized pursuant to a search warrant. The trial court denied the defendant's motion, correctly holding that the protective sweep was lawful.

a. Relevant Facts

Members of the Seattle Police Department West ACT team arrived at the defendant's home less than one hour after reports came in about the shooting. 5RP 14, 53, 55. Before approaching the defendant's house, via radio reports from officers at the scene of the shooting, the ACT team obtained a name – Cid Chambers, and description of the suspected shooter – black male, 6-3, 235 pounds, faded jacket, dark pants, and a beanie. 5RP 15-16; 6RP 169; 8RP 158. They learned that a woman who they assumed was the suspect's wife or girlfriend was also listed as living in the house. 6RP 175. They learned that the suspect had an out-of-state criminal history and some kind of domestic violence incident or court order. 6RP 171. They knew that the suspect had just committed a homicide, that the murder weapon had not been recovered, and thus, the suspect was considered to be armed and dangerous. 6RP 175, 180.

Acting Sergeant Steve Strand described the radio traffic coming in as "pretty chaotic," and that many times the initial information received is questionable. 8RP 101-02. While the police had no specific information

that there were any other suspects involved in the shooting, the Sergeant was "not confident" that only one person was involved. 8RP 101. They did not have any details of what led to the shooting, whether there was someone else involved or maybe a getaway driver. 8RP 101, 114.

Sergeant Strand described the approach to the house as an "extremely high risk situation." 6RP 174. The officers approached the front door in a tactical line, guns out ready and pointed down. 5RP 21-23. There was a very small porch at the top of a short flight of stairs. 5RP 26. The house appeared to be a small single story house, with windows on each side of the front door. 5RP 26. On the left side, the lights were on; on the right side, the window was dark. 6RP 174.

Officer Anthony Belgarde, who was first in line, put his gun away and knocked on the door. 5RP 28. Officer Nicolas Meyst spotted a man approaching the door who matched the minimal description they had of the shooter. 8RP 135. He informed the team that there was a person coming to the door who "might" be the suspect. 8RP 135. Instead of opening the door, the man peeked through a small window at the top of the door. 5RP 28. Officer Belgrade then announced that it was the Seattle Police and to open up. 5RP 28. The person opened the door and stepped one to two feet over the threshold and onto the porch. 5RP 30. Matching the suspect's description, the man was placed in cuffs, patted down, and

because the porch was so small and in the line of fire from anyone inside, the suspect was taken to the bottom of the stairs. 5RP 30, 34, 39; 110. No gun was found on the suspect. 5RP 39.

As Officer Belgarde was placing the suspect under arrest, he could hear noises coming from inside the house indicating that there was another person or persons in the house. 5RP 74. Asked his name, the suspect variously said Cid or Lovett. 5RP 45. The officers did not know for sure whether or not the person they had in custody was the shooter from the Feedback Lounge. 8RP 137.

When the suspect was moved from the doorway, Officer Meyst immediately stepped inside to protect the suspect and officers from anyone who might be inside and armed. 8RP 137. There was a female on the couch who proceeded to get up and approach the officer. 8RP 138. She was told to sit down and she did. 8RP 138. It was later determined that this was the defendant's wife. 6RP 184-86. Officers then entered the house to do a protective sweep, checking only places where a person could hide or pose a threat to them. 5RP 98-100; 6RP 186-87.

Entry into the house is via a small living room, where the suspect had been seen walking from and where his wife was found. 6RP 187. Attached to the right side of the living room through an entryway, with no doors, is a walkthrough kitchen. 6RP 187; 8RP 165. Officer Gochnour

entered the living room and then walked into the kitchen where she observed in plain sight laying on a table, a gun, keys to a BMW, a cell phone and an extra gun magazine. 8RP 165. She did not seize or touch the items. 8RP 166. Instead, the house was secured, and a search warrant was prepared wherein the items were taken into evidence. 5RP 100; 6RP 189; 8RP 166. The entire entry and protective sweep took only a minute or two. 8RP 142, 167. It is the above items that the defendant claims should have been suppressed based on his claim that the protective sweep was illegal.

b. Standard Of Review

In reviewing the denial of a CrR 3.6 suppression motion, the appellate court determines whether substantial evidence supports the court's findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Findings are also viewed as verities if there is substantial evidence to support the findings. Id. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Id. Conclusions of law are reviewed *de novo*. Mendez, at 214.

c. The Protective Sweep Was Lawful

In Maryland v. Buie, the United States Supreme Court announced that the Fourth Amendment permits "protective sweeps" inside a home under certain circumstances. 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). A "protective sweep," the Court said, is a constitutionally permissible search that is executed at the time of a suspect's arrest and that is substantially limited in scope and whose sole purpose is safety and security. Buie, 494 U.S. at 327. It is a "quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." Id. The sweep "is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Id.

The concept of a protective sweep was adopted by the Court to justify the reasonable steps taken by arresting officers to ensure their safety and the safety of others while effectuating an arrest in a home. State v. Boyer, 124 Wn. App. 593, 600, 102 P.3d 833 (2004) (citing Buie, at 333-34), rev. denied, 155 Wn.2d 1004 (2005). As the Court noted, "[t]he risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter." Buie, at 333. The police are at the disadvantage of being on the "adversary's turf," in a confined setting of unknown configuration, and

more susceptible to a surprise attack. Id. In sum, the risk of danger with in-home arrests justifies steps by the officers "to assure themselves that the house in which a suspect is being, ***or has just been***, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." Buie, at 333 (emphasis added).

Consequently, "as an incident to the arrest the officers can, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." Buie, at 334. To justify a protective sweep beyond immediately adjoining areas, the officers must be able to articulate "facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id; see also State v. Hopkins, 113 Wn. App. 954, 959, 55 P.3d 691 (2002).

Here, the defendant challenges the protective sweep in two ways. First, he asserts that because the defendant was able to step across the threshold of his front door before he was actually placed under arrest, the police were completely barred from conducting a protective sweep of any of the house's interior. Second, he asserts that even if the officers could

conduct a protective sweep, the kitchen was beyond the scope of a permissible protective sweep.

As to the first challenge, the defendant seeks to introduce a rigid yet artificial barrier, the threshold of the front door, wherein if a suspect is placed under arrest just inside the threshold of the front door, police can conduct a protective sweep to ensure everyone's safety, whereas if the suspect is able to leap across that threshold before being placed under arrest, police must effectuate the arrest at their peril. This is counterintuitive to the purposes of the protective sweep rule and it is not a barrier that was put in place by Buie.

In Buie, the Court stated that the purpose of a protective sweep is to protect officers and others while the police are in the act of effectuating an arrest and immediately after the arrest is effectuated.[14] The Court did not hold that the exact location the suspect was standing when he was physically placed under arrest dictates the permissible scope of a protective sweep. Such a distinction would be logically unsound. Rather, the safety net is cast to the areas in which the suspect is located while the police are attempting to place him under arrest, as they place him under

[14] In Buie, after an armed robbery, police obtained arrest warrants for Buie and a suspected accomplice and then executed the warrant on Buie's house. After Buie emerged from the home's basement, he was placed under arrest and a protective sweep was done of the basement. Clothing matching the description provided of the robber was observed in plain view. Buie, at 328.

arrest and as they exit the scene of the arrest. To find otherwise would place officers in an unjustifiable risk not contemplated by Buie. After all, "[a] bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another." United States v. Hoyos, 892 F.2d 1387 (9th Cir. 1989), cert. denied, 498 U.S. 825 (1990), overruled on other grounds by United States v. Ruiz, 257 F.3d 1030 (9th Cir. 2001).

Many courts around the nation have rejected attempts to put in place the artificial limitation the defendant seeks to place on Buie. See, e.g., State v. Manuel, 229 Ariz. 1, 4-6, 270 P.3d 828 (2011) (police arrested Manuel when he emerged from his hotel room, the protective sweep of the hotel room "was justified under the first Buie exception," wherein no reasonable suspicion was required, the room being immediately adjacent to the place of arrest); United States v. Henry, 48 F.3d 1282, 1284 (D.C. Cir. 1995) (suspect arrested as he emerged from an apartment, protective sweep ruled lawful -- "[a]lthough Buie concerned an arrest made in the home, the principles enunciated by the Supreme Court are fully applicable where, as here, the arrest takes place just outside the residence"); United States v. Oguns, 921 F.2d 442, 446-47 (2d Cir. 1990) (protective sweep of apartment following arrest of suspect "just outside" open doorway ruled lawful); United States v. Jackson, 700 F.2d 181,

189-90 (5th Cir.), cert. denied, 464 U.S. 842 (1983) (two suspected drug dealers observed leaving motel room were patted down for a suspected weapon, with no weapon found, and no way of knowing if others involved, agents permitted to conduct a protective sweep of the two rooms for their own safety and the safety of others).[15]

In United States v. Knights,[16] the Supreme Court noted that it is "dubious logic - that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it." The Buie court had no occasion to address the scope of a protective sweep for someone who has just emerged from a home and stepped across the threshold before being arrested. As the above cases clearly show, the logic and reasoning of Buie apply just the same. Like here, in each of the above cases, the courts found applicable either the first or second prong of Buie and allowed for a protective sweep of a home or residence in which the suspect had just emerged and been arrested.

---

[15] See also Murphy v. State, 192 Md. App. 504, 513-17, 995 A.2d 783 (2010) (after ordering out and placing under arrest all known occupants of an apartment, police allowed to conduct a protective sweep of the apartment – court rejects attempt to limit Buie based on the location of the arrest, after all, "nothing but an open door stood between the officers ... and harm's way" (internal citation omitted)); People v. Maier, 226 Cal.App.3d 1670, cert. denied, 502 U.S. 848 (1991) (police conducted a protective sweep of home after Maier, a suspected arm robber, came out of the home and was placed under arrest – court states that the issue is whether there was a reasonable belief of danger, not "on which side of a door an arrest is effected").

[16] 534 U.S. 112, 117-18, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001).

The defendant's second challenge is equally unavailing, that the kitchen was beyond the scope of a protective sweep. Under Buie, "as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." Buie, at 334. The defendant focuses solely on the locations of the living room and kitchen, while ignoring the fact that the rooms are attached, the only separation being an open entryway with no doors, and a ready place from which an attack could easily be launched.

State v. Sadler[17] is illustrative in regards to the scope of a protective sweep. Fourteen year old K.T. had disappeared from a foster home. The police received information that recent internet activity showed K.T. may be located at Sadler's residence. Two officers responded to Sadler's address. At his front door, Sadler told the officers that K.T. was upstairs sleeping. Sadler and one officer went upstairs where K.T. was found, partially naked, sleeping or unconscious in a bed surrounded by bondage equipment. Sadler was then placed under arrest at the top of the stairs near the bedroom where the girl was found.

[17] 147 Wn. App. 97, 193 P.3d 1108 (2008), rev. denied, 176 Wn.2d 58 (2013).

After Sadler was placed under arrest, the other officer entered into a different room up near the bedroom where the defendant had been arrested, and observed numerous sexual devices and video camera equipment. The officer had no specific reason to suspect anyone else was in the residence. Sadler moved to suppress the evidence discovered in the bedroom, claiming, among other things, that the search of the bedroom exceeded the permissible scope of a protective sweep. The court rejected Sadler's claim. The court stated that Sadler was taken into custody just outside the upstairs bedroom where K.T. was found, and the protective sweep did not extend beyond the "adjoining rooms" and the "floor below" where Sadler was detained for a period of time. Sadler, at 125-26. In addition, the search did not go beyond a cursory visual inspection of only those places where a person could hide. Id.[18]

Here, the court made the factual finding that the kitchen fit within the scope of adjoining the place of arrest as stated in Buie. This finding is supported by the evidence. The front door opens into the living room and

[18] See also United States v. Lauter, 57 F.3d 212, 213-14 (2d Cir. 1995) (officers entered Lauter's two bedroom apartment and arrested him while in bed in the first bedroom – court rules as part of a protective sweep officers allowed to enter second room and look behind bed where a person could be hiding); In re Sealed Case 96-3167, 153 F.3d 759, 770 (D.C. Cir. 1998) (suspect arrested after he ran upstairs and entered a large bedroom – search of a smaller bedroom that "was only a few feet from the larger bedroom door and only a few feet from the top of the stairs," and "was a space from which an attack could be immediately launched," fell within the scope of a protective sweep); United States v. Robinson, 775 F. Supp. 231, 231 (N.D. Ill. 1991) (officers' protective sweep of locked bedroom was permissible given that the bedroom was a space immediately adjoining the place of arrest from which an attack could be immediately launched).

the walkthrough kitchen is attached to the living room with no door in between. Essentially, it is one room. When first observed, the defendant was in the living room. When officers arrested the defendant at his front door, they could see a woman in the living room – the location of the gun was unknown. It was also not known whether they had the correct person in custody or whether there were other persons in the house. Any step into the living room would place the officers in an area where an immediate attack could be launched from the living room / kitchen area. The defendant fails to show that the trial court's determination was incorrect.

In any event, any error by the trial court was harmless for two reasons.

To begin, the fact that an officer observed the gun on the kitchen table was a fact that was included in the affidavit in support of the issuance of a search warrant for the defendant's home. CP 2321-35. If the observation of the gun was obtained via an unconstitutional search, that information may not be used to support a warrant. State v. Eisfeldt, 163 Wn.2d 628, 640, 185 P.3d 580 (2008) (citing State v. Ross, 141 Wn.2d 304, 311-12, 4 P.3d 130 (2000). A reviewing court would then view the warrant, without the illegally gathered information, and determine if the remaining facts still present probable cause to support the warrant. Id. If

the warrant, viewed in this light, fails for lack of probable cause, the evidence seized pursuant to that warrant must also be excluded. Id.[19]

In reviewing a search warrant for probable cause, great deference is given to the issuing court's decision. State v. Cole, 128 Wn.2d 252, 286, 906 P.2d 925 (1995). Any doubts as to the existence of probable cause "are resolved in favor of the warrant." Id.

"Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). It is only a showing of probability, not a prima facie case, that must be found. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). The issuing judge is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. Id.

The defendant asserts that because the affidavit fails to provide the specific names of some of the witnesses, that without the evidence of the gun, the warrant fails under the Aguilar-Spinelli test.[20] Under the Aguilar-

---

[19] If the gun was observed in plain view during a valid protective sweep, it was subject to seizure and admissible into evidence regardless of the warrant's validity. See Harris v. United States, 390 U.S. 234, 236, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968).

[20] Referring to Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

Spinelli test, an unnamed informant's tip may establish probable cause if the affidavit sufficiently demonstrates the informant's basis of knowledge and reliability. State v. Gaddy, 152 Wn.2d 64, 71, 93 P.3d 872 (2004). Independent police investigation corroborating the informant's tip sufficiently cures a deficiency in either or both prongs. Cole, at 287.

The affidavit here indicates that there were multiple 911 calls reporting a shooting in the area of the Beveridge Place Pub and that the victim had been shot multiple times. The witnesses (plural) described the shooter as a black male, 40s, approximately 6-3, 235 pounds and with a consistent clothing description. The witnesses said that the victim left in a red pickup truck, and the shooter left in a blue BMW, and a plate number for the BMW was provided. The witnesses also said that the shooter was armed with a .40 or .45 caliber. One witness told police at the scene that the shooter was seen talking to an employee at the Feedback Lounge.

Along with the fact that multiple witnesses were all reporting the same thing, a fact that provides reliability to their firsthand account of what they observed, police follow-up corroborated and added to the information. There was indeed a shooting victim who was driven to Providence nursing home in a red pickup truck. Officers found .45 caliber shell casings at the scene. Officers confirmed with a Feedback Lounge employee that the suspect had been in the Lounge and she provided his

name, Lovett Chambers, and his nickname, Cid. Police ran the name and found that a person by that name not only existed but that they lived just a short distance away from the scene of the shooting.

Police also confirmed that Lovett Chambers owned a BMW under an alias, Cidrick Mann, registered to the same address. Police went to that address and found the BMW and confirmed that Lovett Chambers was actually at the house and that he matched the description of the shooter. He also responded to the police when using his alias, Cid, and smelled of alcohol suggesting he may have been drinking at the Feedback Lounge.

Under these facts, there is a logical inference that Chambers was involved in a shooting and that evidence of the crime, the gun, additional ammunition, bloody clothing, etc., might be found at his home, the place he was found at less than an hour after the shooting.

And finally, the failure to suppress evidence obtained in violation of a defendant's Fourth Amendment rights is constitutional error and is presumed to be prejudicial. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). However, a constitutional error may be harmless "if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result, despite the error." State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995). The court will examine the untainted evidence to determine if it is so overwhelming

that it necessarily leads to a finding of guilt. Guloy, 104 Wn.2d 412 at 426.

This was not a "who done it" case. It was a case of self-defense. While the gun, BMW keys, and gun magazine were introduced into evidence, they were not needed to tie the defendant to the crime. Other evidence clearly established the defendant was the shooter – through the people he knew at the Feedback Lounge, and through the fact that he was seen by independent witnesses shooting the victim and then getting into his BMW and driving home. In point of fact, the absence of the gun would likely have hurt the defense because it would have suggested that he disposed of the gun and thus undermine his pseudo PTSD mental defense. In other words, it would have shown he had the capacity to hide evidence at a time when he claimed otherwise.

4. THE DEFENDANT HAS FAILED TO SHOW THAT HE WAS DEPRIVED OF HIS RIGHT TO COUNSEL DURING THE DEPOSITION OF BRIAN KNIGHT

The defendant contends that his murder conviction must be reversed because he was in restraints during the taking of the deposition of Brian Knight. The video of the deposition, that does not show the defendant, was played for the jury at trial. The defendant's claim is without support. The defendant was never seen by the jury in restraints – live or on video, and he failed to provide any evidence to the trial court

that demonstrated that he was unable to communicate with his counsel during the taking of the deposition.

a. Relevant Facts

Brian Knight witnessed the shooting of Travis Hood. CP 2326-35. Knight also happened to work for the Defense Department and was scheduled to be in Japan for work during trial. CP __, sub # 226. On December 13, 2013, Judge Ronald Kessler signed an order directing the taking of a deposition of Knight. CP __, sub # 154.

On December 17, 2013, the parties got together to take Knight's deposition. Present were the defendant's two attorneys, Benjamin Goldsmith and Lauren McLane; the prosecutor, Margaret Nave, a videographer, a court reporter, and Detective Tim DeVore. Pretrial exhibit 57 at 1-2, 76. No judge was present, although the parties used an empty courtroom to take the deposition. Id. at 4.

When the defendant was brought into the courtroom by jail officer(s), he had on physical restraints. Pretrial exhibit 58 at 8. Without consulting anyone from the jail, the prosecutor agreed to an order permitting the defendant to be without any restraints for the deposition. CP __, sub # 157; pretrial exhibit 58 at 1. Believing the agreed order was for the taking of a deposition of the defendant, Judge Michael Hayden signed the order. CP __, sub # 157; pretrial exhibit 58 at 1-3.

Attorney Nancy Balin, representing the jail, then addressed the court and clarified that the order was not for the taking of a deposition from the defendant. She then discussed the jail's concern with having the defendant appear restraint free at Knight's deposition. She first noted that generally the right to be free from restraint pertained to appearing in front of the jury or in front of the court, that jail policy generally would not have a defendant free from restraints for this type of meeting, and that along with this being a murder case, the defendant had a violent criminal history that included an actual escape from custody by the use of force and a kidnapping conviction. Pretrial exhibit 58 at 4-5.

The defense response was that the defendant was now 69 years old and his convictions were from a long time ago. Id. at 6-7. Counsel added that his right of confrontation was being infringed because with the restraints on, the defendant "can't review the impeachment materials," and "[h]e's not able to take notes in a meaningful way." Id. at 10-11.

Judge Hayden confirmed with a jail sergeant the type of restraint the defendant would be wearing. A jail sergeant said the defendant would be wearing "waist chains." Id. at 8. The judge asked "[w]aist chains like this?" to which the sergeant responded, "yes."[21] Id.

[21] A record was not made as to exactly what the sergeant was referring to, however, it appears that the sergeant either had a set of waist chains with him or possibly another inmate in the courtroom was wearing waist chains.

The court disagreed with defense counsel's assessment of the defendant's ability to write and take notes. Id. at 10-11. He also indicated that he was unaware of the information presented to him when he first signed the order allowing for the removal of the restraints. Id. at 11. Judge Hayden denied that defendant's request to be restraint free. Instead, he ordered that the defendant could be restrained so long as he was provided with a notepad and "set up so that he can take notes." Id. at 11. Judge Hayden stated that he did not believe the defendant's constitutional rights were being violated. Id.

The parties then went back to the courtroom and completed the deposition without incident. Pretrial exhibit 57. On multiple occasions when necessary, the parties were able to have off the record discussions. See, e.g., id. at 19, 47, 66, 68, 71. At the beginning of the deposition, defense counsel put on the record what had occurred in front of Judge Hayden. Id. at 6. He then described that the defendant was wearing a belly chain with handcuffs and that between the belly chains and the handcuffs were 4 links of chain that he believed amounted to 4 or 5 inches of linked chain. Id. at 6.

On January 7, 2014, the defense told the court they would be moving to exclude Knight's deposition because the defendant was not able communicate with counsel during the deposition. 2RP 42-43. The

defense told the court that the defendant "could *barely* take notes," and that there were only 5 or 6 links of chain between his belly chains and his wrists. 2RP 36-37 (emphasis added). He also stated, for the very first time, that there was a microphone on the table and therefore the defendant could not lean over and ask him questions. 2RP 38. He asserted that the defendant could not move because the chains rattled and would be heard on the video. 2RP 38. In a response that did not really address the court concern that defense counsel never raised this issue at the time, counsel said that he did not raise this issue before because "it happened during the deposition." 2RP 43.

The prosecutor responded that the microphone could have been moved [or turned off], and that all defense counsel had to do if they needed to have a discussion between counsel and the defendant was to ask for a break. 2RP 45-46. The prosecutor also said that it was her observations that the defendant could talk with counsel and that he could hold documents. 2RP 46. The court reserved ruling on the motion. 2RP 51. The motion was subsequently heard by Judge James Rogers, apparently because the trial judge had some sort of conflict. 16RP 5.

Before Judge Rogers, defense counsel asserted that you could hear chains jingling in many places on the video and you could hear defense counsel whispering to the defendant to not move because it made the chain

rattle. 16RP 12-13. Other than the video of the deposition being provided to the court, no evidence or testimony was presented by the defendant.

The prosecutor offered to bring in a pair of belly chains for the court and also offered to provide testimony under oath. 16RP 29, 31. The prosecutor described that the defendant was wearing a waist chain, attached to the waist chain were two 8 inch lengths of linked chain that were then attached to handcuffs that went around the defendant's wrist. 16RP 29. The prosecutor informed the court that in her opinion, the defendant could write on a tablet and that she observed him at the deposition holding papers. 16RP 29-30. The prosecutor also informed the court that she could not hear any chains jingling on the video. 16RP 33. She again stated that the microphones could easily have been moved or turned off. 16RP 38-39.

Judge Rogers noted that there were disputed facts as to what the defendant could and could not do. 16RP 30. The judge did note that Judge Hayden certainly believed that the defendant had the ability to take notes. 16RP 30. The court stated that there was a "factual dispute" about whether the defendant had the ability to take notes but that "on this record, I cannot resolve the issue." 16RP 51. Inexplicably, the court then stated that "therefore, I decide that I must assume that Mr. Chambers could not write for the purposes of this motion." 16RP 48.

In regards to the issue of the microphones and the fact that defense counsel never either objected to the microphone or did anything to alleviate the alleged problem, the court declined to rule whether the issue had been waived or invited. 16RP 53. Instead, Judge Rogers noted that he listened to the video and he never heard anything that sounded like chains and never heard anyone tell the defendant not to move. 16RP 51-52.[22] Moreover, the court noted that the issue of the microphones was totally under the defense control, the issue would have existed whether the defendant was in restraints or not, the microphones could have been muted, moved or the proceedings stopped at any time, just like at trial. 16RP 25, 55. Because the defendant had this ability to control communications, the court found that the defendant's rights were not violated. 16RP 55.

The deposition was played for the jury and the transcript provided as an aid when listening to the deposition. 24RP 130-31; trial exhibit 9; CP 1598-99.

[22] The trial judge, Judge Theresa Doyle, also listened to the video and even when provided with the specific places the defense said you could hear the sound of chains, she stated that she could not hear anything that sounded like chains. 24RP 111-16, 121-22. In an abundance of caution, the court allowed the defense to seek redaction of any portion of the video wherein they believed chains could be heard. 16RP 33. The State had a video company remove all sound coming from any of the microphones that were in the courtroom except for the microphone on the witness stand. 24RP 5.

b. The Defendant's Rights Were Not Violated

The defendant begins his legal argument by citing to cases discussing the constitutional principle that under article I, section 22,[23] and the Sixth Amendment, a defendant has a right to appear before a jury free from physical restraints. Def br. at 61 (citing, e.g., State v. Williams, 18 Wash. 47, 51, 50 P. 580 (1897) (Washington adopted the common law rule that accused persons should not be manacled before the jury least the jury believe that the judge is of the opinion the accused person is dangerous). The reliance upon this legal principle is misguided for a number of reasons.

First, the defendant cites to State v. Walker,[24] for the proposition that this constitutional legal principle applies to all court proceedings. Def. br. at 61-62. However, the defendant fails to show that this legal principle applies to a deposition which is not a court proceeding.

Walker involved the propriety of defendants being shackled at sentencing hearings. The court held that a trial court does possess the inherent power to determine whether and in what manner restraints may be used at any "court proceeding." Walker, at 797. However, the court

---

[23] Article I, section 22 provides, "In criminal prosecutions the accused shall have the right to appear and defend in person."

[24] 185 Wn. App. 790, 344 P.3d 227, rev. denied, 183 Wn.2d 1025 (2015).

specifically declined to hold that article I, section 22 applies to other court proceedings other than trial. Id.

Pursuant to CrR 4.6, the taking of a deposition in a criminal case is governed by the civil rules, primarily CR 30 and CR 32. The taking of a deposition is not a court proceeding. See Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 256 P.3d 1179 (2011). There is no judge, no jury, no bailiff, no court clerk and the deposition need not occur in a courtroom, although it did in this case for the convenience of the parties and the jail.

In Tacoma News, the State obtained an order for a preservation deposition of a key State's witness in a criminal case. The deposition was held in a courtroom with Judge James Cayce agreeing to preside over the deposition. Judge Cayce, however, closed the courtroom to the public and the press. Tacoma News asserted that the preservation deposition was a judicial proceeding and that under the State constitution, the deposition must be open to the public. The Supreme Court held otherwise. The Court noted that there may certainly be objections to the admissibility of the deposition at trial, but the taking of a deposition itself is not a court or judicial proceeding. Tacoma News, at 65-69. In short, the defendant here fails to show that Williams and Walker apply to the taking of Knight's deposition.

Equally problematic for the defendant is the fact that the jury never saw him, either in person or on video, while he was shackled. A claim of unconstitutional shackling is subject to harmless error. State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998). To succeed on such a claim, a defendant "must show the shackling had a substantial or injurious effect or influence on the jury's verdict. Because the jury never saw the defendant in shackles, he cannot show prejudice." Id. The same is true here.

Moreover, even under Walker, where it was held that trial courts have inherent authority to regulate the use of restraints at "court proceedings" other than trials, the court noted that "because in the absence of a jury the dangers [of a defendant appearing in restraints] are not as substantial as those presented at trial, a lesser showing than that required at trial is appropriate." Walker, at 799 (citing People v. Fierro, 1 Cal.4th 173, 219-20, 821 P.2d 1302 (1991), cert. denied, 506 U.S. 907 (1992)). In other words, the right to be free from restraints, if it exists at all in a non-court proceeding, may yield to the interest of courtroom safety, security and decorum with a minimal showing. Walker, at 800. Thus, while a "showing may be insufficient to justify shackling a defendant in the presence of the jury, in light of the lesser showing required...in a non-jury setting," the evidence need not be as substantial. Id.

Here, while the defendant discounts or attempts to excuse his prior violent and criminal conduct, the facts are real. He had spent a large portion of his life in prison for committing multiple armed robberies, kidnapping, and other violent offenses. He had escaped from custody in the past and had used force to effectuate that escape.

At the time of the current crime, the defendant had a firearm at his disposal and at the time of his arrest. With multiple prior felony convictions, the defendant could not lawfully possess a firearm, but he did so in spite of the law. He also was being accused of firing three shots into a man he had never met before and killing him. He then fled the scene even though he would later claim he acted legally in self-defense. While the defendant argued his convictions occurred long ago and he was now old and had medical issues, his current actions of disregarding the law by possessing a firearm, and his fleeing from the scene, certainly raises questions about his thought process and willingness to comport his behavior with the law.

It is true, maybe a reasonable judge could have found otherwise, but considering that the potential prejudice inherent in a jury or courtroom proceeding was not present, the defendant cannot show that Judge Hayden abused his discretion in denying his motion to be at the deposition restraint free. This is also true considering that Judge Hayden ordered that the

restraints be such that the defendant could take notes and not infringe on his constitutional rights.

The trial court's decision concerning restraints is reviewed under an abuse of discretion standard. Walker, at 799 (citing State v. Finch, 137 Wn.2d 792, 846, 975 P.2d 967 (1999)). An appellate court finds abuse of discretion only "when no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (citing Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). The defendant cannot meet that standard here.

Despite the failure of the defendant's attempt to rely on the principle that an accused should not normally appear in a court proceeding with restraints, the State is not suggesting that other legal principles cannot serve to regulate the taking of depositions. For prior testimony to be admissible under the confrontation clause and ER 804(b)(1), the witness must be unavailable and the defendant must have had a prior opportunity and similar motive to cross-examine the witness. See State v. Benn, 161 Wn.2d 256, 265, 165 P.3d 1232 (2007). Thus, it would seem to be axiomatic that the right to counsel would attach to the taking of a deposition if the deposition is going to be admissible in lieu of live testimony. See State v. Everybodytalksabout, 161 Wn.2d 702, 708, 166 P.3d 693 (2007) ("The United States Supreme Court has interpreted the

right [to counsel] to apply 'whenever necessary to assure a meaningful defense.'") (citing United States v. Wade, 388 U.S. 218, 225, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). Here, the defendant does not contest that Knight was unavailable and that he had a similar motive, and did, fully and completely cross-examine Knight.

The use of restraints in some instances can impermissibly infringe on a defendant's right to counsel. See Illinois v. Allen, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) ("one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint"). Here, the defendant asserts that his right to counsel was violated because he was unable to communicate with counsel. The problem with this claim is that there are no facts in the record to support it. While the defendant's trial counsel made many post-deposition allegations of fact (many of which were highly disputed, if not outright refuted), he did not substantiate his allegations with any evidence. The defendant did not testify that he was so restrained he could not write or communicate with counsel. The defendant also did not submit an affidavit averring to such. Additionally, the actual physical limitations of the defendant were never shown to the court in any manner, not in person, on video, by photograph, by demonstration or by physical evidence such as bringing

similar restraints into court. In short, there was no evidence before the court for the trial court to make a factual finding that the defendant was so restrained that his constitutional right to counsel had been violated.

A trial court's factual findings are reviewed for substantial evidence. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Factual findings are erroneous where not supported by substantial evidence in the record. Finch, 137 Wn.2d at 856. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Id.

Here, Judge Rogers specifically found that the record before him was insufficient to make factual findings. 16RP 48, 51. Inexplicably, Judge Rogers then stated that he must thus presume that the defendant could not take notes or write. 16RP 48. There is no legal basis for the court to have made this factual presumption and to the extent that it amounts to a finding of fact, it is not supported by "substantial evidence" and is thus erroneous.[25]

In addition, defense counsel's post-deposition assertion that his client could not communicate with him at all because if he moved, the

[25] Even defense counsel's bare allegations varied and were insufficient. For example, as stated in the fact section above, it is unclear how many linking of chain or how long the chain was from the belly chain to the handcuffs. Further, belly chains are not tightly secured around the waist, and each set of handcuffs attached to his wrists would add additional length. From the record, it is absolutely impossible to determine how far from his body the defendant could move his hands or what his actual abilities were.

chains made noise that would be picked up on the video is both dubious, not supported by any facts, and is something that if true, was totally and completely within his control to correct.

The claim was dubious considering defense counsel repeatedly told the court that the rattling of chains could be heard on the video but neither Judge Rogers nor Judge Doyle, or the prosecutor who was present at the deposition and listened to the video, heard anything that sounded like chains. Defense counsel also claimed that he could be heard on the video telling his client not to move because his chains made noise, but again, nobody else appeared to be able to hear this. And other than counsel's bare assertion, no evidence was presented to Judge Rogers or on appeal supporting this factual assertion.

Additionally, whether considered invited error,[26] waiver,[27] or simply evidence that the defendant was not really prevented from communicating with counsel, the defendant and defense counsel could have taken a myriad of actions that would have alleviated the problem of verbal communication being inhibited. First, they could have brought it to

---

[26] The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273, 274 (2002). Even constitutional error can fall under the invited error doctrine. State v. Henderson, 114 Wn.2d 867, 868-70, 792 P.2d 514 (1990).

[27] The failure to object generally bars review. See State v. Williams, 159 Wn. App. 298, 312, 244 P.3d 1018, rev. denied, 171 Wn.2d 1025 (2011). An objection gives the trial court and opposing counsel an opportunity to correct the alleged error. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

the attention of Judge Hayden instead of recognizing the issue and sitting on it until trial. Also, the microphone on counsel's table could have been moved or turned off, its only purpose for being on counsel's table was for objections that could be easily raised and heard on the microphone used for direct questioning. Also, as the prosecutor stated below, at any time, the proceeding could have been stopped for counsel and the defendant to confer. See State v. Gonzales-Morales, 138 Wn.2d 374, 386, 979 P.2d 826, 832 (1999) (Where the defendant has the option of interrupting the testimony to permit communication with his counsel, the right to counsel is preserved).[28] As the record of the deposition hearing clearly shows, there already were a number of off the record discussions.

For all of the legal and factual reasons cited above, the defendant's claim that he was deprived of his right to counsel fails.

---

[28] The defendant's reliance on State v. Ulestad, 127 Wn. App. 209, 111 P.3d 276 (2005), rev. denied, 156 Wn.2d 1003 (2006) is unavailing. In Ulestad, a child sex abuse victim was placed in another room and allowed to testify via closed circuit television. A statute, RCW 9A.44.150, requires that when using this procedure, the defendant must be in "***constant communication*** with defense counsel by electronic means." Ulestad, at 214 (emphasis added). The court did not possess this technology so in order to object or talk with his attorney, who was in the room with the victim for questioning, the defendant, who was in front of the jury, had to overtly indicate that he wanted to stop the proceedings. This procedure, the court held, "failed to provide Ulestad with constant communication with his attorney as required by subsection (h) of RCW 9A.44.150." Id. at 215. The court added that requiring the defendant to exhibit his intent in front of the jury could intimidate him from communicating with his counsel. Id. This was not an issue here – no jury was present. Any "noise" from the restraints that occurred when the defendant asked to speak with counsel could easily have been edited out.

5. THE PROSECUTOR DID NOT COMMIT MISCONDUCT

The defendant contends that the prosecutor committed such flagrant and egregious misconduct in rebuttal closing argument that his conviction must be reversed. This claim is without merit. Specifically, the defendant claims the prosecutor committed misconduct by disparaging defense counsel. The record does not support the defendant's claims, and even if it did, he can show no prejudice.

The law governing claims of misconduct is well-settled. When a defendant alleges improper argument, he bears the heavy burden of establishing both the impropriety of the prosecutor's comments, as well as their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

The defendant is correct, it is misconduct for the prosecutor to disparage defense counsel. See State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984). But it is not enough to simply raise an allegation, error will not be found until such time as the defense meets its burden of showing that it is "*clear and unmistakable*" that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, rev. denied, 111 Wn.2d 641 (1985). Moreover, "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense

counsel." Russell, at 87. And along with the defendant's requirement to prove "clear and unmistakable" misconduct is the acknowledgment that greater latitude is given in closing argument than elsewhere during trial. State v. Stover, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), rev. denied, 120 Wn.2d 1025 (1993). When a prosecutor does no more than make reasonable arguments and inferences based on the facts in evidence, no misconduct occurs. State v. Clapp, 67 Wn. App. 263, 274, 834 P.2d 1101 (1992), rev. denied, 121 Wn.2d 1020 (1993). In addition, remarks of the prosecutor, even if improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her actions and statements. Russell, at 87.

The defense challenges two comments, the first of which is as follows from rebuttal closing argument:

> The defense in this case has clearly tried to make this case about race. They have portrayed Jonathan Vause and Travis Hood as racists, and yet strangely the defense has argued all along, has told you that the defendant was not troubled by the racist slurs that he claims those two men told him. That didn't bother him. He told the police, it was like water off a duck's back. It didn't bother him. So the question you need to ask is why then has the defendant made this a case about race. The reason they have made it a case about race is because they're trying to pander to your prejudices. . . . They're trying to make you not use your rational thought process. They're trying to make it so that your prejudice against racism clouds your judgment.

46RP 168-69 (a defense objection was overruled). Because an allegation of misconduct must be viewed in context, it is important to include what the prosecutor said next that was not quoted by the defense:

> The State in this case is not asking you to tolerate racism. The State is asking you to refuse to let your abhorrence of racism get in the way of a rational view of the evidence in this case. And that's what the law requires too. We talked a lot about that, or at least I talked about it to you in opening closing statement.
>
> The law protects everybody. It protects bigots. It protects people of goodwill. It protects saints. It protects sinners. Murder does not become justified because you may decide or you may believe that the victim in this case is not a nice person or not a good person or a racist.

46RP 169-70.

> The second passage quoted by the defendant is as follows:
>
> Regarding Dr. Cunningham, you know, large parts of what Dr. Cunningham testified to really went to they were trying to make it into an equity defense. The defendant's had a rough life. . . .Dr. Cunningham testified that it was terrible things that happened to the defendant and his years in prison. He suffers from PTSD, and then you heard that the man that was killed was a racist. Don't be fooled. . .Don't be fooled. Look at the evidence that you actually have in front of you, and what does the defendant's past, the defendant's hard life, and even if Jonathan and Jamie did use the N word among themselves, what does that really have to do with what happened on the 21st of January 2012? What does it really have to do?

46RP 184-85.

The defendant claims these comments disparaged defense counsel. This is incorrect. The prosecutor was doing exactly as is permitted, addressing the defense case, the evidence that supports or does not support the defense case, and the defense closing. The prosecutor began her closing remarks by discussing the various thoughts, feeling, biases and prejudices that the jurors might feel after hearing the evidence in this case.

> [W]hen you heard the jury instructions you probably said to yourselves, where do those instructions take into consideration the fact that I'm a human being. I sat here and I listened to evidence and I have feelings. I have emotions. I have sympathies and prejudices. How am I supposed to deal with those? The law actually does address that for you.
>
> The law says that the law recognizes that you have emotions, that you have sympathies, that you have prejudices, but the law tells you that you have to put those aside. You have to analyze the facts in this case without considering your own personal prejudice, sympathies and bias. It recognizes however that those are reasonable emotions to have and that you are going to have them, but you have to put them aside.
>
> You might feel prejudice, for example – well, let's start out with sympathy. You might feel sympathy for the victim. He got shot three times, two times in the back. He died. This was a night that he just went out to have some drinks and he was murdered. You might feel sympathy for the defendant. You might feel sympathy for a man who claims to have been abused by the criminal justice system and a victim of racism. You might feel prejudiced against the defendant because he claims that his life in prison for approximately 20 years caused him to react in a way that was different than other people, and that he should therefore be excused for his actions, or you might feel prejudiced against the witnesses in this case, for example, Jonathan Vause, who testified here.

> You might have had some prejudices against him. You might have decided that Jonathan is a racist.
>
> You have to put those prejudices and feelings aside because they are not part of your decision as to what the facts in this case are. . . .The instructions say you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved, not on sympathy, prejudice and personal preference. . . .The law protects all of us and the law holds all of us accountable regardless of whether we're good people, bad people, bigots, racists, saints or sinners.

45RP 50-52.

After the prosecutor accurately discussed the law on bias and prejudice (see WPIC 1.02; CP 1777-79), the defense began their closing argument with this passage:

> [T]he past quarter century of his life has been a study, has been a story of redemption. Since he last walked into prison in 1980, 34 years ago, when he last walked out in 1989, he has dedicated every waking moment in making Mary Esther Chambers proud of her son, and Mr. Chambers, sir, you have done that. You have done that. You have married a good woman. You have surrounded yourself with friends. You have earned your compassion and kindness. You worked hard. You bought a house.

46RP 65-66.

Defense counsel expressing his personal opinion that his client had made his mother proud, and telling the jury that his life was a story of redemption, hardly seems like an argument directed towards the elements of the crime. Rather, it seems exactly like the argument any good defense

attorney would make, and as the prosecutor addressed in rebuttal, an intent to paint his client out to be a good person who merits the benefit of a doubt. Defense counsel followed up his discussion of the defendant's accomplishments, with a long discourse about how Hood and Vause were violent racists intent on committing a hate crime, and in a statement intended to denigrate the prosecutor and engender passion that the defense repeated over and over, "the State to prove their case brings you the word of one racist." 46RP 79.[29]

Race was certainly an issue in this case but it cannot be ignored that the State's theory – based equally on the evidence, was in sharp contrast to the defense theory. As stated in section C 2 above, Vause testified and was adamant that he and Hood were not racist. 27RP 73-74. He said that they used the word "nigga," not "nigger," and that in the Black community in which they had lived, there was a clear distinction. Id. He testified that both he and Hood were very much a part of the Black culture and that they had not attacked the defendant at his car or hurled racial epithets at him. 28RP 121-23, 128-30. The defense, however, was

[29] See also "And the State brought you the word of a racist to try to prove beyond a reasonable doubt that this wasn't a hate crime." 46RP 76. "And they [the State] rely on Mr. Vause to prove beyond a reasonable doubt that Mr. Chambers was not acting in self-defense." 46RP 98. "I mean this is the person who the State brings you to prove beyond a reasonable doubt that Mr. Chambers was not acting in self-defense, a racist with a hair-trigger temper in this courtroom." 46RP 99. "He is the witness who the State tries to bring to you to prove beyond a reasonable doubt that Mr. Chambers was not acting in self-defense." 46RP 100.

adamant that both Hood and Vause were violent racists and used the word "nigger," not "nigga." Finally, during cross-examination, Vause responded to a particularly heated exchange as follows:

> Again, listen, if you want to insult me and say that I'm racist, I'm going to get pissed and walk up out of here, if I have to go to a jail cell, because those are words right there that's going to cross the line with me, and I don't have a problem stepping my ass up out of here because I'm not racist.

28RP 125.

It also cannot be ignored that the prosecutor was correct in pointing out that despite spending so much time talking about how Hood and Vause were racist, the defense then said it had no effect on the defendant. This is what one of the things the defense said:

> To suggest he put all that at risk because he was called a nigger. Mr. Chambers is a 69-year-old African American man who lived through segregation, who lives in our country where we still have a problem with race. You don't make it that long if you get upset every time somebody calls you a nigger if you're African American.

46RP 65. The defense followed this up with another recitation about the defendant's life:

> Mr. Chambers told you, you know, he told you things about himself that he's not told his wife, that he's not told his family, that are painful, you know, 55 years later for him to talk about, about what it's like to be a 12 year old and have police officers who are grown men call you a nigger while beating you through phone books, handcuffing you to radiators, depriving you of bathroom privileges, hearing the

> sounds of other children beaten until they defecate on themselves with paddles.

46RP 140. Defense counsel then ended with a discussion about the prosecutor's use of the word "defendant" during trial:

> Ms. Isaacson [one of the prosecutors] can't even be bothered to use Mr. Chambers' name to his 74-year-old retired nurse's sister, who he's sitting right there...who hasn't done a single bad thing to anybody in her life, and she's calling him the defendant, the defendant. What was the defendant like when he was growing up? He has a name. His name is Lovett James Chambers. And the fact that the State can't even be bothered to use his name. And you know, when they're talking about Mr. Hood and Mr. Vause as Jamie and Travis, that's quite frankly a cheap ploy to try to dehumanize Mr. Chambers, to try to gain sympathy for Mr. Hood and Mr. Vause. Don't fall for that.

46RP 159.

> Don't let the State burn Mr. Chambers' life to the ground, especially based on what they brought to you in this case.

46RP 166.

As is clearly evident, the prosecutor in rebuttal was addressing the defense case and the defense closing. Importantly as well, the prosecutor never disparaged defense counsel. The comments of the prosecutor were professional and limited to addressing the issues raised by the facts and by the defense closing.

Finally, even if misconduct, the defendant must prove prejudice. The prejudicial effect of alleged improper comment is not determined by looking at the comment in isolation but by placing the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The defendant must prove that there was a "substantial likelihood" that the challenged comments actually affected the verdict. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

This was a two month plus long trial. At the conclusion of which, the jurors heard lengthy and in-depth closing arguments by both parties. The jurors were also instructed that the lawyers' comments are not evidence and that law comes from the court, that they "must not let your emotions overcome your rational thought process," they must decide the case "on the facts proved and on the law given to you, not on sympathy, prejudice, or personal preference." CP 1779. The defendant cannot show that there is a substantial likelihood that these two comments during this entire trial somehow changed the outcome.

E. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 11 day of February, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, David Koch of Nielsen, Broman & Koch, containing a copy of the Brief of Respondent, in STATE V.CHAMBERS, Cause No. 72093-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

02-11-16

Date

Done in Seattle, Washington